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1074
No. 2894

United States
Circuit Court of Appeals

For the Ninth Circuit. 1074

Transcript of Record.
(IN TWO VOLUMES.)

THE UNITED STATES OF AMERICA,
Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Cor-
poration,

Appellee,

VOLUME II.
(Pages 321 to 567, Inclusive.)

Upon Appeal from the United States District Court for the District
of Arizona.

Filed

JAN 10 1917

F. D. Monckton,
Clerk.

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of Arizona.

(Testimony of E. J. Marshall.)

On cross-examination by Mr. Sheridan, the witness testified:

Before meeting Mr. Saunders in 1907 on the occasion when this matter of the transfer was started in Salt Lake City about the first of December, I had met Mr. Saunders before. I first met Mr. Saunders in the winter of 1906, or the early spring of 1907. I had no business transactions with him at that time and no discussion of those properties. My purpose in meeting Mr. Saunders at that time was to call on him and make his acquaintance inasmuch as I had bought three thousand head of steers from him the year previous and was in the market for a similar bunch the coming summer. The idea or suggestion concerning the acquisition of this Buckskin Mountain property occurred to me in this way: In feeding steers obtained from Mr. Saunders in 1906 we found the Bar Z brand predominated. The quality of these steers were good, and feeding operations convinced me [244] that the Utah cattle were the best cattle to feed. The result of the feeding was better than that of the native California or Arizona or New Mexico steers, because they were all heavier boned and a better quality generally. I was desirous of getting hold of a breeding range and I sought to learn who was the owner of the Bar Z brand of cattle. I learned that B. F. Saunders was the owner, but that the property was not for sale. I was in Salt Lake in the late winter of 1906 or spring of 1907 with a view to inquiring for such a property and I was directed to the Cleveland property. I

(Testimony of E. J. Marshall.)

went to look at a bunch of steers quite a distance west from Ogden on the Salt Lake. At a later date Mr. Saunders sent me word sometime in the spring of 1907 that he was sick, and believed he would be willing to sell what was known as the V. T. ranch, and out of that grew an arrangement for me to go and look at it as soon as the snow on Buckskin Mountain would permit.

I had learned prior to that time that Mr. Saunders' place was not for sale. I think Mr. Stevenson told me that, because he was the man whom we sent out to look for cattle and to inquire whether such a property could be procured. Mr. Stevenson had been associated with me for fifteen years as manager of my cattle interests. From the time we first came to California eleven years ago he has been my cattle manager, and I think it was he who brought my attention to the fact that the Saunders place was not for sale. When I found out it was for sale I don't recall whether Mr. Stevenson told me or whether Mr. Saunders wrote me a letter. I know I received letters from Mr. Saunders about that matter. Those letters are now in the vaults of the Grand Canyon Cattle Company. We corresponded on various subjects for three or four years, as I was buying cattle from him for three or four years.

I don't recall that I had any dealings through Mr. Stevenson or anybody else with Al Formasters concerning the purchase of the property. I don't recall transactions with a party of that name for the purchase of this property. [245]

(Testimony of E. J. Marshall.)

Q. Is it true that Mr. Stevenson, in all of these negotiations with Mr. Saunders was representing you as your manager?

Mr. STEVENS.—I object to that on the ground it is incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—I sustain the objection on the ground it is not proper cross-examination.

Mr. SHERIDAN.—Note an exception.

The COURT.—The witness may answer under Rule 46.

(A. He was not.)

Mr. SHERIDAN.—We suppose, your Honor, that we may ask a few more questions.

The COURT.—Yes, they will be received under Equity Rule 46.

(The witness then testified under Equity Rule 46 as follows: Mr. Stevenson was acting for me in inspecting a bunch of cattle that I contemplated buying. I refer to the inspection of the cattle on the V. T. ranch, in June, 1907, and September, 1907, when in my company. Mr. Stevens took over no cattle from Saunders in October, 1907. He appeared as my representative or representative of the Grand Canyon Cattle Company in October, 1907, for the purpose of counting the cattle for the Grand Canyon Cattle Company. He had authority to count the cattle, to tally-brand them, and report to me the number tally-branded. Mr. Stevenson has been my manager for the past eleven years in California. On the occasion of these two trips in 1907, in my company to the Buck-

(Testimony of E. J. Marshall.)

skin Mountain ranch and on the occasion when Mr. Stevenson appeared at the Buckskin Mountain ranch to count cattle in 1907, he had no authority as a representative of the Grand Canyon Cattle Company, because it was not then organized, but he was representing me in other companies and I requested him to go and look at these cattle and pass upon their quality and the quality of the range and the condition of the water and advise me. On these occasions, and during the entire year of 1907 he was in my employ as my cattle manager.)

The above testimony was all objected to by Mr. Stevens, upon the ground it was incompetent and immaterial and not proper cross-examination. [246]

The objection sustained by the Court on the ground it was not proper cross-examination, and the Government, by its counsel, then and there excepted.

WITNESS.—(Continuing:) I sent Mr. Stevenson out to inspect one range during 1907, and that was the V. T. ranch. Before I sent him out to inspect the V. T. ranch I wouldn't say he was in Arizona or Utah making any similar investigations for me except in compliance with my general expressed wish that while he was after cattle he would keep a look-out for a good grazing range on which to feed cattle. If he found such a place he was not authorized to enter into any negotiations.

I arrived on the Buckskin Mountain some time in June, 1907, the first time, and met Mr. Dimmick there at Jacobs lake. On that occasion Mr. Dimmick accompanied me throughout that inspection.

(Testimony of E. J. Marshall.)

The places that I visited in his company were Jacobs lake, House Rock springs, One-mile springs, Two-mile springs, Jacobs pools, the corrals at the end of the pipe line to which water was conveyed to Jacobs Pools, Kane Bed springs, winter headquarters, South Canyon corral and reservoir and pipe line, V. T. Park, Bright Angel's camp, Three lakes—I believe that is all. Mr. Clark was also in that party throughout that inspection. Neither Mr. Clark nor Mr. Dimmick said anything to me about the manner in which those claims were held, nor did I ask them how they were held. Mr. Stevenson was with me on that occasion. He didn't inquire how these claims were held to my knowledge, and I didn't authorize him to make any such inquiries. I made no inquiry because I was inspecting a piece of property with a map in my possession on which are shown titled lands and lands located by scrip, with the information that these lands were owned by Mr. Saunders on which the water was secured. The balance was public domain constituting the winter range of the V. T. ranch. The summer range was the Forest Reserve that you only could operate upon under a lease permit from that department. Mr. Clark gave me the information that he was not cognizant of which of these tracts so marked on the map were patented mining claims or lands on which scrip was located, but he could assure me that all in House Rock Valley and [247] all at the foot of Vermillion Cliffs were either titled under patents or owned by Saunders with scrip locations. That was all he could tell me, the balance I could get from Mr. Saunders.

(Testimony of E. J. Marshall.)

Mr. Dimmick declined to give any information on the June trip. The map I had with me on that occasion is now in evidence here. I had no other map. I rested with the information that was conveyed to me by that map as to the manner in which these claims were held until December, when it was explained to me fully by Mr. Saunders at the time of the transfer, but before the execution of the deeds. He told me there were five patented mining claims, nine tracts in which scrip were located, various unpatented mining claims, and various water appropriations. I had full information that he was deeding me five mining claims, nine under scrip, various unpatented mining claims, and various water appropriations. Mr. Saunders stated to me on that occasion that there was water on the patented mineral claims. I would not have bought them unless I knew there was. He didn't tell me there was water on the unpatented claims in every instance, he told me all the patented claims there covered water or where they expected to get water. On that occasion he called my attention to the unpatented mineral claims and it was my understanding that they had water within their boundaries. As a matter of fact I absolutely would not have bought them if they didn't have water on them. In that conversation Mr. Saunders enumerated the unpatented and scrip locations as well as the patented. I knew the enumeration when the papers were being prepared. When I came down to the Buckskin Mountain ranch first Mr. Clark met me at Lund. Mr. Stevenson had arranged for that with Mr. Clark. The only thing

(Testimony of E. J. Marshall.)

Mr. Saunders had to do with it was the general understanding either through correspondence with me or probably with Mr. Stevenson, that Mr. Clark would be the man to represent Mr. Saunders whenever we could arrange to inspect the property.

Mr. Saunders didn't inform me of Mr. Dimmick's presence on the ranch. I didn't know that I heard Dimmick's name until I reached the ranch and I was introduced to Mr. Dimmick by Mr. Clark, and his capacity as superintendent of the V. T. Park ranch was disclosed to me. [248]

Mr. Stevenson appeared at the V. T. ranch in October, 1907, to count the cattle. He was accompanied by other persons representing me at that time. Mr. Tehbo, who had been taken from the Chino ranch, and Mr. Allen Phoenix, who had been taken from Jesus Maria ranch. They were there to assist Mr. Stevenson in any way and Mr. Stevenson was in charge of that party of three. I don't know whether Mr. Tehbo kept any books or records of the counting of the cattle. However, he was there to assist Mr. Stevenson in any way that he might require. Mr. Phoenix was at that time in my employ on the Jesus Maria property and Mr. Tehbo was a tenant on the Chino ranch. Mr. Tehbo was there under employment by me, but I don't recall how he was paid.

Mr. Stevenson was with me on the second trip which I made for the Buckskin Mountain ranch in 1907, early in September. He was there for the purpose of arranging for the construction of corrals, and seeing that chutes were built in order to make

(Testimony of E. J. Marshall.)

the count later in the year in compliance with the July 30th contract.

The map which has been offered as Defendant's Exhibit "A" is the map I had before me when I made my first inspection. I think that map was produced by Mr. Clark on the trip and left with me. As I believe I have already stated it was made clear to me that the water in House Rock Valley known as the One-mile and Two-mile and House Rock springs and the water at the foot of the Vermillion Cliffs in the vicinity of Jacobs pool was all on either patented mineral claims or lands on which scrip was located. That was explained to me at that time by Mr. Clark and Mr. Dimmick made no explanation of any sort about this matter.

On the occasion of the second trip Mr. Dimmick was with me so little of the time that our conversation was more of a camp-fire conversation at night. I was not with him at all during the daytime. He and Mr. Stevenson rode horseback and I took care of my guests. On this second trip Mr. Stevenson and Mr. Dimmick were looking after the building of these cattle chutes and corrals and making locations for the construction of cattle chutes to aid the branding. [249]

Mr. Dimmick was employed by me on the 5th day of December, 1907. There was no definite understanding between me and Mr. Dimmick before that as to his employment.

The paragraph of Defendant's Exhibit "B," on page eight, where it reads "It is mutually understood that all expenses arising out of the manage-

(Testimony of E. J. Marshall.)

ment” and ending with the words, “the conduct thereof,” related to the contract being carried out literally. In other words, that the cattle would be all counted and tally-branded and we would be able to appear in the City of Salt Lake with a known count and be able to close the transaction on November first.

On account of a severe snowstorm which stopped the tally-branding at 7083 head, and on account of the panic, which caused me to go to Texas, we could not get to Salt Lake until later, and we did reach there and closed this transaction on the 4th or 5th of December. And in closing the transaction this portion of this contract was not literally adhered to, in as much as there was a waiver on the part of Mr. Saunders to take an additional year in which to gather unbranded cattle, and he elected to take our proposition of ten thousand head, and one hundred and seventy-six horses, but my judgment is that all our expenses started on December first, but I am little inclined to believe that possibly a few men on the ranch were paid for November, because I see my notations on the December pay-roll that some man was paid for November. My judgment is that we took charge of the ranch from the first day of December, and assumed expenses only from that time. In all probability we charged Mr. Saunders with the salaries of those men who worked during the month of November. I think I can be reasonably positive that we did not pay all the expenses for the V. T. ranch for the month of November. I can say positively that Mr. Dimmick received \$175 as his salary

(Testimony of E. J. Marshall.)

for the month of December, and none before that.

For me to arrive at the final estimate agreed upon of ten thousand head of cattle I should have to rely entirely and exclusively upon the judgment of Mr. Stevenson, and the proposition was made to us first [250] to accept eleven thousand seventy-three. After a great deal of argument, we decided on making a proposition, on my consulting with Mr. Stevenson, of ten thousand head of cattle and horses. We hung on that for a couple of hours in the middle of the night. Mr. Dimmick and Mr. Clark, and Mr. Saunders were the three men consulted as to what they should accept, and Mr. Stevenson and I as to what we should feel safe in proposing. They finally looked on the ten thousand head, but they were insisting on one hundred seventy-six head of horses in addition, which we finally conceded.

There were Mr. Dimmick, Mr. Clark and Mr. Saunders representing Mr. Saunders' interests and Mr. Stevenson and myself representing my interests, and it was, as a final result of that conversation, that the ten thousand head were agreed upon.

The price agreed upon about the ranch was fifty thousand dollars for what is known as the plant, and sixteen dollars a head for cattle, and I think twenty dollars a head for the horses. The plant consists of all the land owned, scrip, lands, water appropriations, pipe-lines, troughs, corrals, buildings, wagons, supplies, harness, saddles, and everything that went to make up the equipment, and everything that in any way pertains to what is known as the V. T. ranch. That went in as the plant for the sum of

(Testimony of E. J. Marshall.)

fifty thousand dollars; that included all cabins, structures or houses that were located on owned property, or whatever Saunders' rights were to property on the Forest Reserve. In other words, my understanding was that it included any property that Mr. Saunders claimed through either legal or equitable right or through possession.

When the character of these four mineral claims now in suit were brought to my attention it didn't in the least excite my interests in any way as to an inspection of these claims. I made this inquiry of my attorney, "Do I understand that patented mining claims are to be considered as good as United States patents, covering homestead land or desert claim land—in other words, are all United States patents on land of a similar character?" His answer was "Yes."

I don't know that my attorney had made any visit to inspect these claims. I knew of no facts to lay before him except that these lands were [251] pointed out to me as United States patented mining claims. I didn't inform my attorney as to the improvements upon them, stock corrals, houses, etc., around Jacobs lake. I think the opinion he gave me was only an oral one. I don't think I have a written opinion. The opinion to which I refer is the answer he gave me to the question I have just stated.

When the deeds were prepared for signature on these contracts I read them over in every instance before I signed them. The papers were all drawn in my presence. I cannot say whose was the first signature. We signed practically simultaneously.

(Testimony of E. J. Marshall.)

We were all in the room, and as the final copy was prepared we signed them. I read them over as I read every paper that I sign, and my recollection is that Mr. Saunders read them over.

I don't know who the first officers of the Grand Canyon Cattle Company were on and after October 4th, 1907. I was not a member at the time of this incorporation. I became a member on the 29th day of November, 1907. We took all these steps in compliance with the contract with Mr. Saunders of July 30th, looking to the taking the titles to the properties when I received them. I received the properties on the 5th day of December, 1907, as president of the Grand Canyon Cattle Company. I became president on the 29th day of November, 1907.

The stockholders of the corporation at the time I became president were E. T. Earl, John S. Cravens, J. S. Torrance, Isaac Millbank, the Chino Land and Water Company, and E. J. Marshall. They were all the stockholders. The officers on October 29th were E. J. Marshall, President, and either J. S. Torrance or J. S. Cravens, vice-president, and Robert Boltman, Secretary. That is the same Robert Boltman who signed Defendant's Exhibit "E."

Prior to that date I know that the legal firm of O'Melveney, Stevens and Millikin, who have been my attorneys for many years were asked to organize such a company and have it ready at a certain date. The organizers, I assume, were made up of men in their office. I don't know who the men were. I do know that Mr. Henry Stevens was president of the company. Mr. E. E. Millikin is a member of the

(Testimony of E. J. Marshall.)

same firm, and Mr. William S. White was a junior in that law firm, and Mr. Joseph P. Loeb and Mr. Edwin J. Loeb were young men [252] in the office. The stockholders at that time were only what the law required, possibly one share each.

I don't recall on the occasion of this conference at Salt Lake City where Mr. Saunders, Mr. Clark, Mr. Dimmick, myself and Mr. Stevenson participated, any particular mention being made as to what is known as the Kane lode. It was enumerated among all the others in the discussion. It was not brought to my attention at that time that there were any investigations or proceedings concerning that by the Government.

At the time I became president of the Grand Canyon Cattle Company I owned in my own name one share of stock. As a matter of fact I own twenty per cent of the stock of the Grand Canyon Cattle Company.

I have testified that Mr. Dimmick was taken into my employ at the time of this transfer, on December 5th, 1907. He entered our service in the capacity of superintendent of the V. T. ranch, and that also included at that time the Kane Beds ranch. He remained in our service until, I think, December 31st, 1910. He was discharged for insubordination. He was first instructed that my policy in handling ranch superintendents was that they were only permitted to sign pay checks that stated on the face of the check that it was in payment of a stated number of days' labor at a stated price per day. The next particular case that was made to cover was the payment of

(Testimony of E. J. Marshall.)

freight money, the advance to freighters, and that all bills for the purchase of supplies, flour, salt, barbed wire, etc., must first be O. K.'d by him and sent to Los Angeles, to be paid for in the regular way on the regular paper. He carried that plan out for the first month or so and then he made an exception, and paid a few bills direct. It was then that he was written to pretty strongly that it was a violation of his authority, and that he must adhere to his prescribed duties, but he kept violating them, and I wrote him a rather strong letter and he wrote back, that he thought it was asking too much for merchants to wait for payment if the bills were to come to him and then go to Los Angeles, requiring sometimes sixty days in the winter-time for any response. And I wrote that was a question for my office to determine, and not a question for him to violate the rule. I never got that completely straightened out. The next insubordination was the result of my requiring [253] that any improvements done on the V. T. ranch must first be submitted to me in writing, and a definite approval and appropriation made for the work before any work could be done. Certain improvements were taken up with the Forestry Department regarding improvements on the Forest Reserves, and I would approve certain work and make an appropriation during the particular year. In many instances, he expended more, twice as much as I had allotted to the expense. That resulted in one or two very severe letters, and he wrote back that he thought he was the best judge, that he was on the ground, that I was not, that he thought the money

(Testimony of E. J. Marshall.)

had better be expended. The climax came in the year in 1910, when we had two thousand head of cattle at Kane Beds because of the fear of a hard winter as a result of a drouth summer, and Mr. Stevenson sent a special messenger; he was delayed—and it was late, and he decided to bring those two thousand head out—he sent a messenger with a letter to Mr. Dimmick, asking him to furnish this messenger with horses if it took every horse the Grand Canyon Cattle Company owned. Dimmick gave him no horses and sent in word that as long as he was superintendent of the V. T. ranch he would never permit a ranch horse to go on the trail. Well, when Mr. Stevenson returned to Los Angeles, he reported to me, and I told him to look up a new superintendent, and we found our present one, Mr. Mansfield, and Mr. Dimmick was released, to date from December 31st.

I mentioned a Mr. Isaac Millbank as one of the stockholders of the Grand Canyon Cattle Company. He was the same Isaac Millbank that accompanied me on the 1907 trip. He was a director of the company on the 29th day of November, 1907, elected from that date.

On November 29th, 1907, Isaac Millbank, J. S. Torrance, J. S. Cravens, E. T. Earl, and E. J. Marshall were elected directors to take the place of the directors who had been in office since the organization. A corporation named the Chino Land & Water Company was also a stockholder. That was one of my interests. [254]

(Testimony of E. J. Marshall.)

On redirect examination by Mr. Stevenson the witness testified:

I *spoke about* twenty-five hundred head of cattle being taken out of the ranch of Mr. Saunders in 1907. That had nothing to do with the sale of the ranch, these cattle did not come from the ranch. I had about twenty-five hundred or three thousand head to feed in 1906, and I bought another twenty-five hundred in 1907 for November delivery. There were no cattle delivered to the Grand Canyon Cattle Company under this sale until after December 5th.

The payment of expenses from December first was just inserted for the purpose of getting some date when we should begin paying expenses. We took possession on December 5th, after the papers were signed.

In stating that I would not have bought any of these claims unless they had water on them I refer to those patented claims and located scrip land. The unpatented claims were on the Forest Reserve as I understood then and I have since learned definitely. It never occurred to me, however, knowing the property, that it was of very much moment whether we owned or didn't own anything on the Forest Reserve, inasmuch as we already owned lands from which we obtained our water. As we had an expensive pipe-line system and that water and the pipe-line system enabled us to maintain from eight to ten thousand head of cattle. Unless we had grazing permits from the United States Forestry Bureau we couldn't have any rights on the Forest Reserve whether we owned them or not, and for that reason

(Testimony of E. J. Marshall.)

I never attached much importance to the unpatented claims or ownership of anything on the Forest Reserve. Whatever we wanted we applied for and obtained special-use permits. That is the condition of affairs to-day and that is the law as I understand it, and those adjacent to the Forest Reserve have the first call on grazing of Forest Reserve tracts.

I never stated anything about Mr. Saunders retaining an interest to Mr. Barney, the driver. Mr. Barney was a horse handler and I had no conversation with him whatever. [255]

On cross-examination the witness testified:

(Counsel handed two-page letter to witness.) I recognize that letter.

Mr. SHERIDAN.—We offer in evidence this portion of the letter as Government's Exhibit 57, "In substantiation of this statement we beg to state that under the terms of our purchase from B. F. Saunders we received and tally-branded eight thousand and seventy-three head of cattle up to November 1st, 1907." That is all we desire to be admitted.

The COURT.—That portion of the letter may be admitted, it being signed by Mr. Marshall as president of the Grand Canyon Cattle Company.

Letter introduced in evidence and marked "Government's Exhibit No. 57."

WITNESS.—(Continuing:) I stated I was not interested in unpatented mineral claims by reason of the fact that all use of any portion of the Forest Reserve was only at the pleasure of the Government, and that therefore the question of ownership on the

(Testimony of E. J. Marshall.)

Government Forest Reserve always occurred to me as a matter of rather limited importance. Everything that Mr. Saunders had or owned or had to do with his plant, the V. T. ranch, he must convey, and we assume he did convey.

Mr. SHERIDAN.—In view of the evidence that has been introduced we ask the Court to reverse its ruling excluding the conversation had between Mr. Harris and Mr. Stevenson at the V. T. Park, between the 18th and 23d day of October, 1907.

The COURT.—I adhere to my former ruling and sustain the objection.

Mr. SHERIDAN.—To which we note an exception.

The Chino ranch, the Jesus Maria ranch and the Palomas ranch are all owned by corporations. When I have spoken of doing certain things in the cattle business I am referring to the companies, not to what I myself have done. I have done very little individually. [256]

**Government's Exhibit No. 2—Application for Patent
for the Sunset Mill Site and Sunset Lode Mining
Claim.**

CERTIFICATE.

Copies of Papers Relating to Patent Proceedings
for the Sunset Millsite and Sunset Lode.

APPLICATION FOR PATENT.

Territory of Arizona,
County of Yavapai,—ss.

**APPLICATION FOR PATENT FOR THE
“SUNSET” MILL SITE AND “SUNSET”
LODE MINING CLAIM.**

To the Register and Receiver of the U. S. Land
Office, at Prescott, Territory of Arizona:

John M. Ross, whose postoffice address is Prescott, Arizona, attorney in fact for B. F. Saunders, of Salt Lake City, Utah, being duly sworn, according to law, deposes and says: That in virtue of a compliance with the mining rules, regulations and customs, by the said B. F. Saunders, claimant, who is applicant for patent herein, has become the owner of, and is in the actual, quiet and undisturbed possession of 1175 linear feet of the vein, lode or mineral deposit, Survey 2118-A, together with surface ground 555 feet in width, for the convenient working thereof, also, “Sunset” mill site, Sur. No. 2118-B, as allowed by local rules and customs of miners and the laws of the United States and the laws of the Territory of Arizona, said mineral claim, vein, lode or deposit and surface ground being situated in the Warm Springs Mining District, County of Coconino, Terri-

tory of Arizona, and being more particularly set forth and described in the official field-notes of survey thereof, hereto attached, dated the 30th day of August, 1905, and in the official plat of said survey, now posted conspicuously upon said Mining Claim or premises, a copy of which is filed herewith.

Deponent further states that the facts relative to the right of possession of said claimant to said Mining Claim, vein, lode or deposit, and surface ground, so surveyed and platted, are [257] substantially as follows, to wit:

By location, as is shown by the location notices herewith filed, no transfers of said lode and mill site having ever been made. Which will more fully appear by reference to the copy of the original record of location heretofore furnished, and the abstract of title hereto attached and made a part of this affidavit; the value of the labor done and the improvements made upon said claim, by himself and his grantors, being equal to the sum of eight hundred and fifty (\$850) dollars, and said improvements consist of 1 tunnel 4x6x90 ft.

In consideration of which facts, and in conformity with the provisions of Chapter Six, of Title XXXII, of the Revised Statutes of the United States, and under application is hereby made for and in behalf of said B. F. Saunders for a patent from the Government of the United States for the said "Sunset" mill site and "Sunset" Mining Claim, vein, lode, deposit and the surface ground so officially surveyed and platted.

JOHN M. ROSS,

Attorney in Fact for B. F. Saunders.

Subscribed and sworn to before me this 20th day of September, A. D. 1905, and I hereby certify that I consider the above deponent credible and reliable person, and that the foregoing affidavit, to which was attached the field-notes of survey of the "Sunset" mill site and "Sunset" Mining Claim, was read and examined by him before his signature was affixed thereto and the oath made by him.

FEN S. HILDRETH,

Register.

[Endorsed]: Filed in Local Land Office, Sept. 20, 1905. Received at General Land Office January 2, 1906. [258]

Field-notes of Survey by John T. Breckon, United States Deputy Mineral Surveyor, under instructions dated June 20th, 1905. The Survey commenced June 29th, 1905. Completed June 30th, 1905. Mineral Survey No. 2118-A and B.

Here follows field-notes of the Survey of Sunset lode and Sunset mill site, showing courses and distances as set forth in the patent, and showing area of Sunset lode to be 14,632 acres, and showing area of Sunset millsite to be 4.976 acres.

LOCATION.

This claim is located on unsurveyed ground. It would be located approximately in T. 38 N. R. 5 E., of the Gila and Salt River Meridian, if the present surveys were extended. There are no known adjoining claims.

EXPENDITURE OF FIVE HUNDRED DOLLARS.

I certify that the value of the labor and improve-

ments upon this claim placed thereon by the claimant and his grantors, is not less than Five Hundred Dollars, and that said improvements consist of:

No. 1, A tunnel 4x6x90 ft. long, in rock, the mouth of which brs. S. 80° W. 25 ft. from the discovery of the Sunset lode and runs N. 18° E. to face.

Value, \$850.

An open cut 6 ft. deep, 10 ft. wide and 50 ft. long in earth and loose rock, the mouth of which brs. N. 3° 30' W. 300 ft. from the corner No. 1, of the Sunset millsite, and runs N. 60° E. to face.

Value, \$150. [259]

FINAL OATHS FOR SURVEYS.

(List of names of individuals employed by John T. Breckon, United States Deputy Mineral Surveyor, showing that Charles Dimmick was employed as chainman and H. B. Young as ex-man.)

FINAL OATHS OF ASSISTANTS.

(Affidavit of Charles Dimmick and H. B. Young that they assisted in making survey.)

FINAL OATH OF UNITED STATES DEPUTY MINERAL SURVEYOR.

I, John T. Breckon, U. S. Deputy Mineral Surveyor, do solemnly swear that, in pursuance of instructions received from the United States surveyor-general for Arizona Territory, dated June 20th, 1905, I have, in strict conformity to the laws of the United States, the official regulations and instructions thereunder, and the instructions of said surveyor-general, faithfully and correctly executed the survey of the Mining Claim of B. F. Saunders, known as the Sun-

set lode and Sunset mill site, situate in — Mining District, Coconino County, Arizona Territory, in Section approx. Township No. 38 N., Range No. 5 E. unsurveyed and designated as Survey No. 2118-A & B, as represented in the foregoing field-notes, which accurately show the boundaries of said mining claim as distinctly marked by monuments on the ground, and described in the attached copy of the location certificate, which was received by me from the surveyor-general with said instructions, and that all the corners of said survey have been established and perpetuated in strict accordance with the law, official regulations and instructions thereunder; and I do further solemnly swear that the foregoing are the true and original field-notes of said survey and my report therein, and that the labor expended and improvements made upon said mining claim by claimant or his grantors are as therein fully stated, and that the character, extent, location and itemized value thereof are specified therein with particularity and full detail, and that no portion of said labor or improvements so credited to this claim [260] has been included in the estimate of expenditures upon any other claim.

JOHN T. BRECKON,
U. S. Deputy Mineral Surveyor.

Subscribed and sworn to by the said John T. Breckon, U. S. Deputy Mineral Surveyor, before me a notary public, this 26th day of July, 1905.

[Seal]

ROBT. E. ROSE,
Notary Public.

My commission expires March 18, 1908.

AFFIDAVIT OF FIVE HUNDRED DOLLARS
IMPROVEMENT.

We, Chas. Dimmick and H. B. Young, of lawful age, being first duly sworn according to law, depose and say: That we are acquainted with the Sunset lode & Sunset millsite mining claim, situate in Warm Springs mining district, Coconino County, Arizona Territory, for which B. F. Saunders, has made application for survey prior to application for patent under the provisions of the Act of Congress approved May 10, 1872; and that the labor done and improvements made thereon by the applicant and his grantors exceed five hundred dollars in value, and further that we are not personally interested in said mine.

CHAS. DIMMICK.

H. B. YOUNG.

State of Utah,
County of Kane,—ss.

Sworn to and subscribed before me this 21st day of
July, 1905.

[Seal]

JOHN F. BROWN,

Notary Public, Kane Co., Utah. [261]

NOTICE OF LOCATION.

Notice is hereby given, that the undersigned, having complied with the requirements of Section 2324 of the Revised Statutes of the United States, and the local laws, customs and regulations of this district, has located twelve hundred feet in length by 600 feet in width, on this, the Sunset Lode, vein or deposit, bearing gold, silver, copper, lead and other valuable minerals, situated in House Rock Valley about 1 mile east of Jacobs Pools Spring, in the Warm Spring

Mining District, Coconino County, Territory of Arizona, and location being described and marked on the ground as follows, to wit:

Beginning 620 feet north of this location (Discovery) monument at the north and center monument, and running thence westerly 300 feet to N. W. corner monument No. 1, thence southerly 1200 feet to S. W. corner monument No. 2, thence easterly 600 feet to S. E. corner monument No. 3, thence northerly 1200 feet to N. E. corner monument No. 4, thence westerly 300 feet to place of beginning, including all dips, spurs, angles and variations, from the discovery the lode line runs northerly 620 ft. and southerly 580 ft.

The above-described mining claim shall be known as the Sunset lode.

Located this 15th day of February, 1904.

Names of Locators:

B. F. SAUNDERS.

Recorder at request of B. F. Saunders, March 1st, A. D. 1904, at 9 o'clock A. M., in Book 5, page 360.

Records of Coconino County, Arizona.

[Seal]

H. C. HIBBEN,

County Recorder. [262]

SUNSET MILL SITE.

To whom these presents may concern:

Know ye, that I, B. F. Saunders, declare and publish as a legal notice to all the world, that I have a valid right *right* to the occupation, possession and enjoyment of all and singular that tract or parcel of land not exceeding five acres, situate, lying and being in Warm Springs Mining District, Coconino County,

Territory of Arizona, bounded and described as follows: Beginning at corner No. 1, which brs. N. 57° 20' W. 2230 feet from the N. W. corner of the "Sunset lode" mining claim, thence running N. 24° E. 510 ft. to corner of No. 2, thence N. 66° W. 425 ft. to corner No. No. 3, thence S. 24° W. 510 ft to corner No. 4, thence S. 66° E. 425 ft. to corner No. 1, the place of beginning, containing an area of 4.976 acres, together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining and shall be known as "Sunset Mill site."

Located this 15th day of February, 1904.

B. F. SAUNDERS.

Recorded at the request of B. F. Saunders, March 1st, 1904, at 9 o'clock A. M.

H. C. HIBBEN,
County Recorder.

SURVEYOR-GENERAL'S CERTIFICATE OF
APPROVAL OF FIELD-NOTES AND SUR-
VEY OF MINING CLAIM.

Department of the Interior,
Office of U. S. Surveyor-General,

Phoenix, Arizona, Aug. 30, 1905.

I, U. S. Surveyor-General for the district of Arizona, do hereby certify that the foregoing and hereto attached Field-Notes and Return of the Survey of the Mining Claim of B. F. Saunders, known as the Sunset lode and Sunset mill site situate in Warm Springs, Mining District, Coconino County, Township No. 38 N., Range No. 5 E. unsurveyed, Arizona Territory, in Section [263] approx.,

designated as Survey No. 2118 A. & B, executed by John T. Breckon, U. S. Deputy Mineral Surveyor, June 29-30, 1905, under my instructions dated June 20, 1905, have been critically examined and the necessary corrections and explanations made, and the said field-notes and return, and the survey they describe, are hereby approved. A true copy of the location certificate filed by the applicant for survey is included in the field-notes.

(Signed) FRANK S. INGALLS,
U. S. Surveyor-General for Arizona.

U. S. SURVEYOR-GENERAL'S FINAL CER-
TIFICATE ON FIELD-NOTES.

Department of the Interior,
Office of U. S. Surveyor-General,

Phoenix, Arizona, Aug. 30, 1905.

I, U. S. Surveyor-General for the district of Arizona, do hereby certify that the foregoing transcript of the Field-Notes, return and approval of the survey of the mining claim of B. F. Saunders, known as the Sunset lode and Sunset mill site, situate in Warm Springs Mining District, Coconino County, Arizona Territory, in Section approx. Township No. 38 N., Range No. 5 E, unsurveyed, and designated as survey No. 2118 A. & B, has been correctly copied from the originals on file in this office; that said Field-Notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects or per-

manent monuments as will perpetuate and fix the locus thereof.

And I further certify that five hundred dollars' worth of labor has been expended or improvements made upon said mining claim by claimant or his grantors, and that said improvements consist of 1 tunnel 4 x 6 x 90 ft., value \$850.00, and that no portion [264] of said labor or improvements has been included in the estimate of expenditures upon any other claim.

I further certify that the plat thereof, filed in the U. S. Land Office at Prescott, Arizona, is correct and in conformity with the foregoing field-notes.

FRANK S. INGALLS,

United States Surveyor-General for Arizona.

(Endorsement on back showing field-notes received at General Land Office January 2, 1906.)

ABSTRACT OF TITLE.

(Contains copies of location notices of Sunset Lode and Sunset Mill site, duly certified by the County Recorder of Coconino County, of Arizona, and certificate of the clerk of the district court showing no judgments or suits pending.)

AFFIDAVIT OF CITIZENSHIP.

(Affidavit of B. F. Saunders made September 26th, 1905, before James H. Ball, notary public, Salt Lake County, Utah, stating that Saunders was a native born citizen of the United States, born at Albany, County of Gentry, State of Missouri, in the year 1847.)

POWER OF ATTORNEY.

(Made by B. F. Saunders, May 15th, 1905, appoint-

ing John J. Hawkins, and John M. Ross, or either of them, attorneys in fact to make application for patent and take necessary proceedings therefor.) [265]

PROOF OF MILL SITE.

(Affidavit of B. F. Saunders, Chas. Dimmick and C. D. Crosbie, made November 11, 1905, before Soren C. Jensen, notary public, Coconino County, Arizona, stating that they were citizens of the United States, and that the ground embraced within the Sunset mill site survey, No. 2118-B, is used or occupied by the claimant Saunders for mining purposes, to wit: "The storing of ore from the "Sunset" lode for milling purposes.")

PROOF OF POSTING NOTICES AND DIAGRAM OF CLAIM.

(Affidavit of Charles Dimmick and George Voice that they posted a copy of the application for patent, copy of which is set forth, in a conspicuous place upon the Sunset lode mining claim.)

CERTIFICATE THAT THE NOTICE REMAINED POSTED SIXTY DAYS.

(Certificate of Milton R. Moore, Register United States Land Office at Phoenix, Arizona, dated December 21, 1905, that notice of application for patent for the Sunset lode and Sunset mill site remained posted in the land office from September 20, 1905, until December 21, 1905.)

PROOF THAT PLAT AND NOTICE REMAINED POSTED ON CLAIM DURING TIME OF PUBLICATION.

(Affidavit of John J. Hawkins, made December 11,

1905, before John M. Ross, notary public, Yavapai County, Arizona, that notice of application for patent and plat remained posted on the claim for sixty days.) [266]

PROOF OF PUBLICATION.

(Affidavit of C. A. Neal, editor and publisher of the "Williams News," a weekly newspaper published at Williams, Coconino County, Arizona, that he will hold B. F. Saunders alone responsible for publishing notice, and no claim should be made against the United States.)

UNITED STATES LAND OFFICE.

In the Matter of Application for Patent for "Sunset" mill site, Survey No. 2118-B, B. F. Saunders, Claimant.

NONMINERAL AFFIDAVIT.

Territory of Arizona,
County of Coconino,—ss.

Chas. Dimmick and C. D. Crosbie, each of lawful age and residents of Houserock, in said County, being first duly sworn, each for himself and not one for the other, saith:

That he is a citizen of the United States; that he is well acquainted with the "Sunset" mill site claim of B. F. Saunders, situate in Warm Springs mining district, in said county, upon which said B. F. Saunders has applied for patent of the United States, and knows the character of said described land, having frequently been actually upon the same; that his knowledge of the land is such as to enable him to testify understandingly with regard thereto; that there

is not to his knowledge within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any placer, cement, or other valuable mineral deposits, or any deposit of coal; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or [267] rules of miners or otherwise; that no portion of said land is worked for minerals during any part of the year by any person or persons; that said land is essentially nonmineral land, and that he has no interest whatever in said claim, or in said application for patent.

CHAS. DIMMICK,

C. D. CROSBIE.

Subscribed and sworn to before me, this 23 day of November, A. D. 1905, and I hereby certify that the foregoing affidavit was read to the above-named Chas. Dimmick and C. D. Crosbie previous to their names being subscribed thereto, and that deponents are reputable persons, to whom full faith and credit should be given.

SOREN C. JENSEN,

Notary public.

My commission expires May 1, 1905.

APPLICATION TO PURCHASE.

(Application of B. F. Saunders by John J. Hawkins, his attorney in fact to purchase lands embraced within the Sunset lode and Sunset mill site, approximately in Township 38 north, Range 5 east G. & S. R. meridian, and known as Survey No. 2118-A and

2118-B, agreement to pay therefor the sum of one hundred dollars.

CERTIFICATE OF REGISTER OF LAND
OFFICE.

that land is subject to entry, the legal price thereof is one hundred dollars.)

STATEMENT OF FEES AND CHARGES.

(Affidavit of John J. Hawkins, attorney in fact for B. F. Saunders, setting forth statement of expenditures and charges in connection with the patenting of Sunset lode and Sunset mill site.) [268]

RECEIVER'S RECEIPT.

(Receipt by J. M. W. Moore, Receiver of United States Land Office, of the sum of ten dollars on making application for patent.)

RECEIVER'S RECEIPT.

(Duplicate to be given the Purchaser.)

Mineral Entry No. 93,

Lot No. 2118-A. & B.

United States Land Office at Phoenix, Arizona,

December 21, 1905.

Received from B. F. Saunders, by John J. Hawkins attorney in fact, the sum of One hundred dollars, the same being payment in full for the area embraced in that mining claim known as the Sunset lode and Sunset mill site, in Township No. 38, N. of Range No. 5 E. meridian, designated as Lot — No. 2118-A & B, said lot — No. 2118-A & B extending 1175 feet in length along said *Sunste* Sunset vein or lode, expressly excepting and excluding from this sale and entry all that portion of the ground embraced in min-

ing claim or Survey designated as Lot — No. —. And also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode mining claim as entered embracing 14.632 acres and said mill site claim 4.976 acres, in the Warm Springs Mining District, in the County of Coconino and Territory of Arizona, as shown by the survey thereof.

FEN S. HILDRETH,
Receiver.

December 21, 1905. [269]

REGISTER'S FINAL CERTIFICATE OF
ENTRY.

Department of the Interior, United States Land Office,
at Phoenix, Arizona.

December 21, 1905.

Mineral Entry No. 93,
Lot No. 2118-A & B.

It is hereby certified that in pursuance of the provisions of the Revised Statutes of the United States, Chapter VI, Title XXXII, and legislation supplemental thereto B. F. Saunders, by John J. Hawkins, attorney in fact, whose postoffice address is Prescott, Arizona, on this day purchased that mining claim known as the Sunset lode and Sunset mill site, situated on unsurveyed land, and approximately in Section —, in Township No. 38 north of Range No. 5 E., G. & S. R. B & meridan, designated as Survey No. 2118-A & B, said Sur. No. 2118-A & B, extending eleven hundred and seventy-five feet in length along said Sunset vein or lode, expressly excepting and excluding from said purchase all that portion

of the ground embraced in mining claim or survey designated as Lot — No. — and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode mining claim, as entered, embracing 14.632 acres, and said mill site claim 4.976 acres in the Warm Springs mining district, in the County of Coconino and Territory of Arizona, as shown by the plat and field-notes of survey thereof, for which the said party first above named this day made payment to the receiver in full, amounting to the sum of one hundred (\$100) dollars.

NOW, THEREFORE, be it known that upon the presentation of this certificate to the commissioner of the General Land Office, together with the plat and field-notes of survey of said claim and the proofs required by law, a patent shall issue thereupon to the said B. F. Saunders if all be found regular.

MILTON R. MOORE,
Register. [270]

PATENT.

General Land Office,	Mineral Certificate,
No. 44023.	No. 93.

The United States of America, To all to whom these
Presents shall come,
Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the Certificate No. 93 of the

register of the Land Office at Phoenix, in the Territory of Arizona, accompanied by other evidence whereby it appears that B. F. Saunders did, on the twenty-first day of December, A. D. 1905, duly enter and pay for that certain mining claim or premises, known as the Sunset lode mining and Sunset mill site claim designated by the Surveyor-General as Lot No. 2118-A and 2118-B, embracing a portion of the unsurveyed public domain in the Warm Springs Mining District, in the County of Coconino, and Territory of Arizona, in the District of Lands subject to sale at Phoenix, and bounded, described, and platted as follows, with magnetic variation fifteen degrees east.

Beginning for the description of the lot No. 2118-A, at corner No. 1, a cedar post four inches square, four feet long, marked 1-2118-A, with mound of stone, from which U. S. location monument No. 3, bears north six degrees and fifty-six minutes east three hundred and forty and four-tenths feet distant.

Thence, first course, north eighty-one degrees and twenty minutes east five hundred and thirty feet to corner No. 2, a cedar post four inches square, four feet long, marked 2-2118-A, with mound of stone.

Thence, second course, north eight degrees and twenty-one minutes west one thousand one hundred and seventy-four and nine-tenths feet to corner No. 3, a cedar post four inches square, four [271] feet long, marked 2-2118-A, with mound of stone. from which discovery bears south twelve degrees and fifty-seven minutes west six hundred and sixty-

five and nine-tenths feet distant.

Thence, third course, south eighty-one degrees and twenty minutes west five hundred and fifty-five feet to corner No. 4, a cedar post four inches square, four feet long, marked 4-2118-A, with mound of stone.

Thence, fourth course, south nine degrees and thirty-four minutes east one thousand one hundred and seventy-five feet to corner No. 1, the place of beginning. Said lot No. 2118-A, extending one thousand one hundred and seventy-five feet in length along said Sunset vein or lode and containing fourteen acres and six hundred and thirty-two thousandths of an acre.

Beginning for the description of the lot No. 2118-B, the Sunset mill site claim, at corner No. 1, a cedar post four inches square, four feet long, marked 1-2118-B, with mound of stone, from which said U. S. location monument No. 3 bears south forty-six degrees and fifteen minutes east two thousand nine hundred and twenty-six and seven-tenths feet distant and corner No. 4 of said lot No. 2118-A, bears south fifty-seven degrees and twenty minutes east two thousand two hundred and thirty feet distant.

Thence, first course, north twenty-four degrees east five hundred and ten feet to corner No. 2, a pine post four inches square, four feet long, marked 2-2118-B, with mound of stone.

Thence, second course, north sixty-six degrees west four hundred and twenty-five feet to corner No. 3, a pine post four inches square, four feet long, marked 3-2118-B, with mound of stone.

Thence, third course, south twenty-four degrees west five hundred and ten feet to corner No. 4, a pine post four inches square four feet long, marked 4-2118-B, with mound of stone.

Thence, fourth course, south sixty-six degrees east four hundred and twenty-five feet to corner No. 1, the place of beginning; [272] said lot No. 2118-B, containing four acres and nine hundred and seventy-six thousandths of an acre, which together with the area embraced in said lot No. 2118-A, aggregates nineteen acres and six hundred and eight thousandths of an acre of land, more or less.

Now Know Ye, That there is therefore hereby granted by the United States unto the said B. F. Saunders, and to his heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Sunset vein, lode or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 2118-A, extended downward vertically, although such veins, lodes, or ledges, in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of possession to such outside parts of said veins, lodes, or ledges, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 2118-A, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes, or ledges;

and provided, further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To Have and to Hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to his heirs and assigns forever; subject nevertheless to the above mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lodge, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be [273] found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the Legislature of Arizona, may provide rules for working the mining claim or prem-

ises hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the ninth day of June, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirtieth.

By the President, T. ROOSEVELT.

By F. M. McKEAN,

Secretary.

[Seal]

C. H. BRUSH,

Recorder of the General Land Office. [274]

**Government's Exhibit No. 1—Application for Patent
for the Jacobs Mining Claim, Dated August 8,
1904.**

PATENT PROCEEDINGS JACOBS LODGE.

Application for Patent for the Jacobs mining claim, dated August 8th, 1904, by B. F. Saunders by John J. Hawkins, his attorney in fact.

Field-notes of survey of the mining claim made March 3d, 1904, by John T. Breckon, U. S. Mineral Surveyor.

Preliminary Oaths of Assistants in Survey.

(All in form similar to those set forth in Government's Exhibit No. 2.)

In the field-notes under the head of "Expenditure of \$500," the Deputy Mineral Surveyor certifies that the improvements consist of,

No. 1. An open cut 4 feet wide, 5 feet deep and 45 feet long in rock, the mouth of which bears west 4 feet from the discovery monument and runs north 10 degrees west. Value, \$300.

No. 2. A shaft 4x6 feet and 22 feet deep in earth, well timbered, the center of which bears north 50 degrees, 15 minutes, west 496 feet from corner No. 4. Value, \$150.

No. 3. A shaft 4x6 feet, and 14 feet deep in earth, well timbered, the center of which bears north 30 degrees, east 245 feet from corner No. 1. Value, \$100.

No. 4. A cabin 20x35 feet, built of logs with shingle roof, course of long side, north 88 degrees west, and south 88 degrees east, the southeast corner of which bears north 1 degree and 15 minutes west, 580 feet from corner No. 1. Value, \$100.

Then follows Final Oaths for Survey.

Final Oaths of Assistants. [275]

Final Oath of Deputy Mineral Surveyor, and Affidavit of \$500 of Improvement, similar in form to those set forth in Government's Exhibit No. 2.

NOTICE OF LOCATION (as follows):

Notice is hereby given, that the undersigned having complied with the requirements of Section 2324 of the Revised Statutes of the United States, the laws of the State of Arizona, and the local laws, customs and regulations of this district, have located fifteen hundred feet in length by six hundred feet in width, on this the Jacob Lode, vein or deposit, bear-

ing gold, silver, lead, copper and other valuable metals, situated in usually called Warm Springs Mining District, Coconino County, Ter. of Arizona, and claim nine hundred linear feet along the course of the vein in a southerly direction from this point of discovery, and six hundred linear feet along the course of the vein in a northerly direction from this point of discovery, and three hundred feet in width on the east side of the center of the vein, and three hundred feet in width on the west side of the center of the vein, the general course of said vein, as nearly as can be traced, being north and south, and the location being described and marked on the ground as follows, to wit:

Beginning at monument at point of discovery running south 900 feet, thence east three hundred feet to S. E. corner stake, thence north fifteen hundred feet to northeast corner stake, thence west six hundred feet to N. W. corner stake, thence south fifteen hundred feet to S. W. corner stake, thence east three hundred feet to south line center stake, thence north nine hundred feet to place of beginning. This mine is situated on Buckskin Mountain in Coconino Co. A. T. about two miles east of Petoska. The discovery monument is situated near the north shore of what is known as Jacobs Lake and about four hundred and fifty feet from center thereof. The name of the mining claim above described is, and it shall be known as the Jacob.

Located this 21st day of Oct. 1901.

Names of Locators,

B. F. SAUNDERS. [276]

Recorded this 13th day of December, 1901, at 9 o'clock A. M., in Book 3, of Mining Claims, page 493, Records of Coconino County, Arizona.

[Seal]

H. C. HIBBEN,
Recorder.

Then follows Surveyor-General's Certificate of Approval of Field-Notes and Survey.

Surveyor-General's Final Certificate on Field-notes.

(All similar in form to those set forth in Government's Exhibit No. 2.

Then follows Abstract of Title, showing copy of location notice by B. F. Saunders; Affidavit of Labor Performed during the year 1902; Affidavit of Labor Performed during the year 1903, and Certificate of County Recorder of Coconino County. Certificate of Clerk of the District Court that no judgments or suits pending.

Then follows Affidavit of Citizenship of B. F. Saunders, substantially as stated in Government's Exhibit No. 2.

Then follows Power of Attorney given by B. F. Saunders to John J. Hawkins to make application for patent and to take other steps to secure patent.

Then follows proof of Posting Notice and Diagram on claim, made by Charles Dimmick and Alex Swapp, July 28th, 1904.

Affidavit of John J. Hawkins, made November 3rd, 1904, that plat and notice remained posted on the claim.

Proof of publication from Williams News.
Agreement of Publisher.

Certificate of Register of Land Office that plat remained posted sixty days.

Application to Purchase, and Statement of Fees and Charges.

Then follows Receiver's receipt for \$100, dated November 3, 1904, by J. M. W. Moore, Receiver United States Land Office, similar in form to that set forth in Government's Exhibit No. 2.

Then follows Mineral Application and Register's Final Certificate of Entry, similar in form to those set forth in Government's Exhibit No. 2. [277]

UNITED STATES PATENT (as follows):

General Land Office,	Mineral Certificate.
No. 42246.	No. 626.

THE UNITED STATES OF AMERICA,

To all to whom these Presents shall come, Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States, the plat and field-notes of survey and the Certificate No. 626 of the Register of the Land Office at Prescott, in the Territory of Arizona, accompanied by other evidence whereby it appears that B. F. Saunders did, on the third day of November, A. D. 1904, duly enter and pay for that certain mining claim or premises, known as the Jacob lode mining claim, designated by the surveyor-general as Lot No. 1923, embracing a portion of the unsurveyed public domain in the Warm Springs Mining District, in the County of Coconino, and Territory of Arizona, in the District of Lands

subject to sale at Prescott, and bounded, described, and platted as follows, with magnetic variation fifteen degrees and thirty minutes east.

Beginning at corner No. 1 a pine post four feet long, four inches square marked 1-1923 in mound of stone, from which U. S. Location Monument No. 1 bears south forty degrees and forty-seven minutes west six thousand one hundred and forty-seven and two-tenths feet distant.

Thence, first course, north four degrees and thirty-five minutes west one thousand four hundred and ten feet to corner No. 2, a pine post four feet long, four inches square, marked 2-1923, in mound of stone.

Thence second course, north eighty-five degrees and twenty-five minutes east six hundred feet to corner No. 3, a pine post four feet long, four inches square marked 3-1923 in mound of stone, from which discovery monument bears south twenty-five degrees and thirty-eight minutes west five hundred and ninety-six feet distant.

Thence third course, south four degrees and thirty-five minutes east one thousand four hundred and ten feet to corner No. 4, a pine post four feet long, four inches square, marked 4-1923 in mound of stone.

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Thence fourth course, south eighty-five degrees and twenty-five minutes, west six hundred feet to corner No. 1, the place of beginning, said lot No. 1923 extending one thousand four hundred and ten feet in length along said Jacob vein or lode and containing nineteen acres and four hundred and twenty-one

thousandths of an acre of land, more or less.

NOW, KNOW YE, that there is therefore hereby granted by the United States unto the said B. F. Saunders, and to his heirs and assigns, the said mining premises hereinbefore, described, and not expressly excepted from these presents, and all that portion of the said Jacob vein, lode or ledge, and of all other veins, lodes, and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 1923, extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: Provided, that the right of possession to such outside parts of said veins, lodes, or ledges, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end line of said lot No. 1923, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes, or ledges: And, provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging unto the said grantee above named and to his heirs and assigns forever, subject nevertheless to the above mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with

the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or [279] extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of the courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the Legislature of Arizona may provide rules for working the mining claim or premises hereby granted, involving easements, drainage and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed:

Given under my hand, at the City of Washington, the eighteenth day of March, in the year of our Lord one thousand nine hundred and seven, and of the In-

dependence of the United States the one hundred and thirty-first.

By the President, T. ROOSEVELT,
[Seal] By F. M. McKEAN,
Secretary.
C. H. BRUSH,
Recorder of the General Land Office. [280]

Government's Exhibit No. 10—Application for Patent for Noonday Mining Claim, Dated March 9, 1906.

PATENT PROCEEDINGS NOONDAY LODGE.

Application for Patent for the Noonday Lode mining claim, dated March 9th, 1906, by B. F. Saunders, by John M. Ross, his attorney in fact.

Field-notes of Survey of the mining claim made July 31st, 1905, by John T. Breckon, U. S. Deputy Mineral Surveyor.

Final Oaths for Surveys.

Final Oaths of Assistants.

Final Oath of U. S. Deputy Mineral Surveyor, and Affidavit of \$500 Improvement.

(All in form similar to those set forth in Government's Exhibit No. 2.)

In the Field-notes under the head of "Expenditure of \$500," the Deputy Mineral Surveyor certifies that the improvements consist of,

No. 1. A tunnel 4 by 6 ft. in solid rock, the mouth of which bears north 27 degrees, west 80 feet from the discovery and runs south 80 degrees east 45 feet to face. Value, \$400.

No. 2. A tunnel 4 by 6 feet in solid rock, the mouth of which bears north 34 degrees, west 105 feet,

from the discovery and runs east 25 feet to face.
Value, \$200.

NOTICE OF LOCATION (as follows):

Notice is hereby given, that the undersigned having complied with the requirements of Section 2324 of the Revised Statutes of the United States and the local laws, customs and regulations of this district, has located fifteen hundred feet in length by six hundred feet in width on this, the Noonday lode, vein or deposit, bearing gold, silver, copper, lead and other valuable minerals, situated in House Rock Valley about 1 mile north of House Rock Springs in 1 mile canyon, in the [281] Warm Springs mining district, Coconino County, Arizona Territory, the location being described and marked on the ground as follows, to wit:

Beginning 300 feet northerly of this location (Discovery monument, at the north end center monument, and running thence easterly 300 feet to the NE. corner monument No. 1; thence southerly 1500 feet to the SE. corner monument No. 2; thence westerly 300 feet to the south end center monument; thence westerly 300 feet to the SW. corner monument No. 3; thence northerly 1500 feet to NW. corner monument No. 4; thence easterly 300 feet to place of beginning; including all dips, spurs, angles and variations.

The above described mining claim shall be known as the Noonday lode located this 27th" day of June, 1905.

Names of locators:

B. F. SAUNDERS.

Territory of Arizona,
County of Coconino,—ss.

I, H. C. Hibben, County Recorder in and for the county of Coconino, Territory of Arizona, and custodian of the records thereof, do hereby certify; that the above and foregoing is a full, true and correct copy of the location notice of Noonday mining claim, as the same appears of record in Book 3 of Mines, page 638, records of Coconino County, Ariz.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 19th day of July, A. D. 1905.

[Seal]

H. C. HIBBEN,

County Recorder, Coconino County, Arizona.

By T. E. Pullian,

Deputy.

Then follows Surveyor-General's Certificate of Approval of Field-notes and Survey of Mining Claim.

Surveyor-General's Final Certificates on Field-notes.

(All in form similar to those set forth in Government's Exhibit No. 2.)

Then follows Abstract of Title, showing copy of location notice by B. F. Saunders. [282]

Then follows Affidavit of Citizenship of B. F. Saunders, substantially as stated in Government's Exhibit No. 2.

Then follows Power of Attorney given by B. F. Saunders to John J. Hawkins, and John M. Ross,

to make application for patent and take other steps to secure patent.

Then follows Proof of Posting Notice and Diagram on claim, made by Charles Dimmick and Charles Lewis, February 14th, 1906.

Affidavit of John M. Ross that plat and notice remained posted on the claim, made June 13th, 1906.

Then follows Certificate of Register of Land Office that plat remained posted sixty days.

Agreement of Publisher, and Proof of Publication from Williams News.

Application to Purchase, and Statement of Fees and Charges.

Then follows Receiver's Receipt for \$80, dated June 21, 1906, by Fen S. Hildreth, Receiver United States Land Office, similar in form to that set forth in Government's Exhibit No. 2.

Then follows Register's Final Certificate of Entry, and Affidavit of John J. Hawkins, that no transfer had been made, dated June 18th, 1906.

UNITED STATES PATENT (as follows):
General Land Office, Mineral Certificate.
No. 44871. No. 170.

THE UNITED STATES OF AMERICA,
To all to whom these presents shall come, Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title thirty-two, and legislation supplemented thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the Certificate No. 170 of the Register of the Land Office at Phoenix, in the Territory of

Arizona, accompanied by other evidence whereby it appears that B. F. Saunders did, on the twenty-first day of June, A. D. 1906, duly enter and pay for that certain mining claim or premises, known as the Noonday Lode mining claim, designated by the Surveyor-General as Lot No. 2140, embracing a portion of the unsurveyed public domain, in the Warm Springs Mining District, in the County of Coconino and Territory of Arizona, in the District of Lands subject to sale at Phoenix, and bounded, [282½] described and platted as follows, with magnetic variation fifteen degrees east,

Beginning at corner No. 1 a pine post four feet long, four inches square marked 1-2140 in mound of stone from which U. S. Location Monument No. 5 bears south one degree and fifty-two minutes east, four hundred and eighty-five and two-tenths feet distant, and discovery bears south fifty-two degrees and fifty-five minutes east three hundred and forty-seven and two-tenths feet distant.

Thence first course north eighty-six degrees and sixteen minutes east three hundred feet to witness corner to corner No. 2 a cedar post four feet long, four inches square marked W. C. 2-2140 in mound of stone, six hundred feet to corner No. 2 on ledge and not established.

Thence second course, south five degrees and thirty-five minutes west eight hundred and ninety-six feet to pine post four feet long, four inches square, marked W. C. 2-2140 in mound of stone, one thousand one hundred and forty feet to corner No. 3 a cedar post four feet long, four inches square

marked 3-2140 in mound of stone.

Thence third course, south eighty-six degrees and sixteen minutes west, six hundred feet to corner No. 4 a cedar post four feet long, four inches square marked 4-2140 in mound of stone.

Thence fourth course, north five degrees and thirty-five minutes west, one thousand one hundred and forty feet to corner No. 1, the place of beginning. Said lot No. 2140 extending one thousand one hundred and forty feet in length along said Noonday vein or lode and containing fifteen acres and four hundred and ninety-five thousandths of an acre of land, more or less.

NOW KNOW YE, that there is therefore hereby granted by the United States unto the said B. F. Saunders and to his heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Noonday vein, lode or ledge, and of all other veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 2140 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the [283] right of possession to such outside parts of said veins, lodes or ledges, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 2140, so continued in their own direction that such planes

will intersect such exterior parts of said veins, lodes or ledges; And provided, further that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above-named and to his heirs and assigns forever; subject nevertheless to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of the courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the Legislature of Arizona may

provide rules for working the mining claims or premises hereby granted, involving easement, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, THEODORE ROOSEVELT, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-second day of June, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

By the President: THEODORE ROOSEVELT,

[Seal]

By F. M. McKEAN,

Secretary.

H. W. SANFORD,

Recorder of the General Land Office. [284]

Government's Exhibit No. 11—Application for Patent for Emmett Mining Claim, Dated December 9, 1905.

PATENT PROCEEDINGS EMMET LODE.

Application for Patent for the Emmett Mining Claim, dated December 9th, 1905, by B. F. Saunders by John J. Hawkins, his attorney in fact.

Field-notes of survey of the mining claim made July 31, 1905, by John T. Breckon, U. S. Mineral Surveyor.

(All in form similar to those set forth in Government's Exhibit No. 2.)

Then follows Final Oaths for Survey.

Final Oaths of Assistants.

Final Oath of U. S. Deputy Mineral Surveyor.

NOTICE OF LOCATION (as follows):

Notice is hereby given, that the undersigned having complied with the requirements of Section 2324 of the Revised Statutes of the United States and the local laws, customs and regulations of this district, has located fifteen hundred feet in length by six hundred feet in width, on this, the Emmett lode, vein or deposit, bearing gold, silver, copper, lead and other valuable minerals, situated in House Rock Valley about two miles east of the Jacobs Pools Springs in the Warm Springs Mining District, Coconino County, Arizona Territory, the location being described and marked on the ground as follows, to wit:

Beginning 500 feet south of this location (Discovery) monument at the south end center monument, and running thence easterly 300 feet to the SE. corner monument No. 1, thence northerly 1500 feet to NE. corner monument No. 2, thence westerly 300 feet to north end center monument; thence westerly 300 feet to NW. corner monument No. 3, thence southerly 1500 feet to SW. corner monument No. 4, thence easterly 300 feet to place of beginning, including all dips, spurs, angles and variations.

The above described mining claim shall be known as the Emmett lode located this 27th day of June, 1905.

Names of Locators,
B. F. SAUNDERS.

Recorded at request of B. F. Saunders, July 18th, A. D. 1905, at 9 o'clock A. M.

H. C. HIBBEN,
County Recorder. [285]

Then follows Surveyor-General's Certificate of Approval of Field-notes and Survey.

Surveyor-General's Final Certificates on Field-notes,

(All similar in form to those set forth in Government's Exhibit No. 2.)

Then follows Notice of Location.

Then follows Abstract of Title, showing copy of location notice by B. F. Saunders.

Then follows Affidavit of Citizenship of B. F. Saunders, substantially as stated in Government's Exhibit No. 2.

Then follows Power of Attorney given by B. F. Saunders to John J. Hawkins and John M. Ross to make application for patent and take other steps to secure patent.

Then follows Report of Expenditures upon Mining Claim by John T. Breckon, U. S. Deputy Mineral Surveyor, dated December 2d, 1905. And under "Expenditure of five hundred dollars, the Deputy Mineral Surveyor certifies that the improvements consist of,

A tunnel 4 by 6 ft. in earth and loose rock, the mouth of which bears S. 10 deg. east 160 ft., from the discovery and runs north 91 ft., to face. Value \$700.

Then follows Certificate of Surveyor-General of Improvement.

Then follows Proof of Posting Notice and Diagram

on claim, made by Charles Dimmick and C. D. Crosbie, October 30th, A. D. 1905.

Affidavit of John J. Hawkins, made March 8th, 1906, that plat and notice remained posted on the claim.

Agreement of Publisher.

Certificate of Register of Land Office that plat remained posted sixty days.

Proof of Publication from Williams News.

Application to Purchase, and Statement of Fees and Charges.

Then follows Receiver's Receipt for \$90, dated March 23d, 1906, by Fen S. Hildreth, Receiver United States Land Office, similar in form to that set forth in Government's Exhibit No. 2. Also Mineral Application. [286]

Then follows Register's Final Certificate of Entry, all similar in form to those set forth in Government's Exhibit No. 2.

UNITED STATES PATENT (as follows):

General Land Office.

Mineral Certificate.

No. 44640.

No. 153.

THE UNITED STATES OF AMERICA.

To all to whom these Presents shall come, Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title thirty-two and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of survey and the Certificate No. 153, of the Register of the Land Office at Phoenix, in the Territory of Arizona, accompanied by other evidence

whereby it appears that B. F. Saunders did, on the twenty-third day of March, A. D. 1906, duly enter and pay for that certain mining claim or premises, known as the Emmett lode mining claims, designated by the Surveyor-General as Lot No. 2141, embracing a portion of the unsurveyed public domain in the Warm Springs Mining District, in the County of Coconino and Territory of Arizona, in the District of Lands subject to the sale at Phoenix, and bonded, described, and platted as follows, with magnetic variation fifteen degrees east,

Beginning at corner No. 1, a pine post four feet long, four inches square marked 1-2141 with mound of stones, from which U. S. Location Monument No. 3 bears north seventy-five degrees and thirty-four minutes west three thousand and thirty-seven and nine-tenths feet distant.

Thence first course, south twenty-two degrees and forty-one minutes west one thousand two hundred and thirty-six feet to corner No. 2, a pine post four feet long, four inches square, marked 2-2141 with a mound of stones.

Thence, second course, south sixty-seven degrees and five minutes east six hundred feet to corner No. 3, a pine post four feet long, four inches square marked 3-2141 with mound of stones, from which discovery bears north three degrees, five minutes and thirty seconds west, six hundred and eighty-nine and nine-tenths feet distant.

Thence, third course north twenty-two degrees and forty-one minutes east one thousand two hundred and thirty-six feet to corner No. 4, a pine post [287]

four feet long four inches square marked 4-2141 with mound of stones.

Thence, fourth course north sixty-seven degrees and five minutes west six hundred feet to corner No. 1, the place of beginning, said lot No. 2141 extending one thousand two hundred and thirty-six feet in length along said Emmett vein or lode, and containing seventeen acres and twenty-five thousandths of an acre of land, more or less.

NOW KNOW YE, that there is therefore hereby granted by the United States unto the said B. F. Saunders and to his heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Emmett vein, lode, or ledge, and of all other veins, lodes, and ledges, throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 2141 extended downward vertically, although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; provided, that the right of possession to such outside parts of said veins, lodes, or ledges, shall be continued to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 2141 so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; And provided, further that nothing herein contained shall authorize the grantee herein to enter

upon the surface of a claim owned or possessed by another.

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above-named and to his heirs and assigns forever; subject nevertheless to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top of apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge. [288]

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the Legislature of Arizona may provide rules for working the mining claim or premises hereby granted, involving easements, drainage,

and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twentieth day of October, in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

By the President: T. ROOSEVELT,

[Seal]

By F. M. McKEAN,

Secretary,

C. H. BRUSH,

Recorder of the General Land Office. [289]

Government's Exhibit No. 30-P—Notice of Water Location.

NOTICE OF WATER LOCATION.

Notice is hereby given that the undersigned, B. F. Saunders, is the owner by location for purchase under the Land Laws of the United States of the following described tracts of land situated in Coconino County, Arizona, to wit:

1. House Rock Tract, situated in the House Rock Valley in the northern part of Coconino County, Arizona, containing 40 acres being 1320 feet square, the southeast corner of which bears south 7 degrees east, 819 feet distant, from House Rock Spring, widely known by that name in northern Arizona, and southern Utah.

2. Two Mile Tract situated in House Rock Valley in the northern part of Coconino County, Arizona, containing 40 acres being 1320 feet square, the south-east corner of which bears south 40 degrees east 172 feet distant from Two Mile Spring, a well known spring widely known by that name throughout northern Arizona, and southern Utah, and is situated about two miles in a northerly direction from House Rock Spring.

3. Jacob's Pools Tract, situated in House Rock Valley in the northern part of Coconino County, containing 40 acres, being 1320 feet square, the southwest corner of which bears south 38 degrees 20 minutes west, 925 feet distant from the main or largest pool of Jacob's Pools, so called, which are well known springs, through northern Arizona and southern Utah.

That upon each of said tracts there are springs or pools of water which originally and naturally did not rise to or flow upon the surface of the ground but which have been developed and the water brought to and collected upon the surface by the undersigned, his assignors and grantors, by means of tunnels, open cuts, and ditches driven into the hill.

That said water was, and is developed and the ditches, pipes, water troughs and reservoirs are and in the future will be maintained by the undersigned for the purpose of using the said tracts for beneficial and useful purposes, to wit, for the purpose of the watering of cattle and horses belonging to and in possession of the undersigned and for domestic and

culinary purposes and for irrigation of trees and shrubbery. [290]

That the water now flowing, and to flow upon and from each of said tracts as nearly as can be estimated is as follows: From the House Rock spring, ten gallons per minute, from the Two Mile Spring ten gallons per minute, and from the Jacob's Pool's Spring twenty-five gallons per minute, and will be used upon each respectively and to the full extent thereof, and in addition thereto it is the intention of the undersigned to use the water arising upon the Jacob's Pools Tract upon a tract of land situated about one mile to the south of said tract to which it will be piped by iron or wooden pipe, and there used for domestic and irrigating purposes, and the watering of stock.

This notice is posted in a public place upon each of the tracts of land above described and a copy thereof recorded in the office of the County Recorder of said Coconino County, pursuant to the provisions of the acts of the Governor and Legislative Assembly of Arizona, approved March 22d, and April 13th, 1893.

(Signed) B. F. SAUNDERS.

Residence and postoffice address, Salt Lake City,
Utah.

Recorded at request of B. F. Saunders, August 1st, A. D. 1901, at 9 o'clock A. M., in Book 1 of Mill sites and Water-rights, pages 228 and 229, Records of Coconino County, Arizona. [291]

Government's Exhibit No. 31-P—Deed Dated February 24, 1899, from A. L. Fotheringham and E. B. Gillies to T. S. Kingsbury.

DEED: Dated Feb. 24, 1899, between A. L. Fotheringham and E. B. Gillies, copartners as Fotheringham and Gillies, and T. S. Kingsbury, Fotheringham and Gillies convey to Kingsbury in consideration of \$4000 by the following words of grant "grant, sell and convey, remise, release and forever quitclaim all the right, title and interest, estate, claim and demand" of Fotheringham and Gillies to the following property:

"Undivided three-fourths interest in the Two Mile Ranch; all of the One Mile Ranch; all of the House Rock Ranch; all of the Soap Creek Ranch; all of the Cane Springs Ranch; all of the North Canyon Ranch; all of the Wild Cat Ranch; all of the South Canyon Ranch; all of the Buck Farm Ranch; all of the V. T. Park Ranch; all of the Basin Pasture Ranch; all of the Three Lakes Ranch; all of the Jacobs Lake Ranch; all of the Corral Crane Lake Ranch; and all of Tater Canyon Ranch, Lake Ranch, and all of Look-out Ranch; all of Fracas Lake Ranch; and all water rights upon or in anywise belonging to or used in connection with any and all of the ranches above mentioned and designated."

Signed Fotheringham and Gillies by A. L. Fotheringham.

Acknowledged by A. L. Fotheringham before William F. Knox, Notary Public, Beaver County, Utah, Feb. 24, 1899.

Property conveyed described as situated in Coconino County, Arizona.

Recorded August 1, 1901, at the request of B. F. Saunders in the office of the County Recorder of Coconino County, Arizona, Book 9 of Deed, at page 480. [292]

Government's Exhibit No. 32-P — Deed Dated August 5, 1899, Between Thos. F. Kingsbury and Ora Haley, and B. F. Saunders.

DEED: Dated August 5, 1899, between Thos. F. Kingsbury and Ora Haley and B. F. Saunders. Kingsbury "does grant, bargain, sell, remise and convey unto" Haley and Saunders, their heirs and assigns, the following property situated in Coconino County, Arizona:

"The 'V T' or Kaibab Ranch, comprising a range of about 35 miles northerly and southerly, and about 50 miles easterly and westerly on the north side of the Colorado River. Together with all the houses, corrals and ranch 'improvement' situate thereon, and all the waters and water rights now and heretofore owned, held or used in connection with the said Ranch, and all springs and waters located and situated thereon, and particularly the following waters, water rights and privileges, to wit:

An undivided $\frac{3}{4}$ ths interest in those certain waters known as 'Two Mile Springs'; all of those certain springs known as 'One Mile Springs'; 'Jacobs' Pools Springs,' 'House Rock Springs,' 'Soap Creek,' 'Badger Creek,' 'Kane Springs,' 'South Canyon Springs,' and 'Northern Canyon Springs,' all situate

in House Rock Valley on the ranch or range aforesaid; also the 'Wild Cat Springs,' 'Buck Farm Springs,' and 'Tater Canyon Springs,' all situate on First Bench of the Buckskin Mountains, on the ranch or range aforesaid; also the 'V. T. Park' waters, 'Basin Pasture' waters, 'Three Lakes,' 'Jacobs Lakes,' 'Corral Lakes,' 'Lookout Lakes,' 'Fracas Lakes,' and 'Crane Lakes,' all situated on the Buckskin Mountains on the ranch or range aforesaid, together with all waters flowing or to flow therefrom."

Deed signed by Thos. S. Kingsbury and acknowledged before William J. Barrette, Aug. 5, 1899, Recorded in the office of the County Recorder of Coconino County, Arizona, at the request of B. F. Saunders Aug. 1, 1901, Book 9 of Deeds, Page 483. [293]

Government's Exhibit No. 33-P—Deed Dated December 17, 1900, Between Hyrum S. Shumway and B. F. Saunders.

DEED: Dated December 17, 1900, between Hyrum S. Shumway and B. F. Saunders by which Shumway in consideration of \$300 "does bargain, grant, sell and convey" to Saunders "all the right, title and interest * * * of the said party of the first part (Shumway) in and to that certain lot and parcel of land situated in the northern portion of Coconino County, in the Territory of Arizona, together with all improvements thereon situated or thereunto belonging and described as follows to wit: One bunk house near the mill, one log house out at spring, one corral, large pile of slabs. The Lake, including all buildings, corrals and etc. belonging on said place.

All the fence and fencing enclosing the Lake.”

Signed by Hyrum S. Shumway and acknowledged Dec. 17, 1900, before John F. Brown, Notary Public, Kane County, Utah.

Recorded in the office of the County Recorder of Coconino County, Arizona, Aug. 1, 1901, Book 9 of Deeds, page 486. [293½]

Government's Exhibit No. 34-P—Deed Dated December 2, 1907, from B. F. Saunders and Ora Haley to Grand Canyon Cattle Co.

THIS INDENTURE made the 2d day of December, 1907, between B. F. Saunders * * * and Ora Haley * * * individually and as copartners doing business under the name and style of Haley & Saunders, parties of the first part, and Grand Canyon Cattle Company, a corporation organized under the laws of the State of California, party of the second part,

Witnesseth that said parties of the first part * * * do hereby bargain, sell, convey, assign and transfer to the party of the second part all cattle branded in the straight bar Z (\overline{Z}) brand and now located upon either of those two certain ranches, situate in the counties of Coconino and Mohave, Arizona, one of said ranches being commonly known as the V. T. Ranch, and the other as the Canebed Ranch or upon any part of the ranges or grazing ground heretofore used in connection with said ranch properties or either of them; also all cattle belonging to said first parties or either of them whether branded in said bar Z brand or otherwise now located

upon said ranches, ranges or grazing ground; also all
* * * horses and mules branded in the letter S
brand * * * or otherwise now owned or claimed
by said first parties or either of them and located
upon the lands above mentioned. Said first parties
also bargain, sell, assign, transfer and convey to sec-
ond party each of said brands and the right to use
and enjoy the same.

Signed by Haley and Saunders, Ora Haley and B.
F. Saunders, and acknowledged before James H.
Ball, notary public, Salt Lake County, Utah, Dec. 5,
1907.

Recorded at the request of E. J. Marshall, Jan. 2,
1908, in the office of the County Recorder of Coconino
County, Arizona, in Book 3, Bills of sale, page 185.
[294]

**Government's Exhibit No. 35-P—Deed, Dated De-
cember 2, 1907, from B. F. Saunders and Ora
Haley to Grand Canyon Cattle Co.**

This indenture, made the 2d day of December,
1907, between B. F. Saunders of Salt Lake City,
Utah, and Ora Haley, of Laramie, Wyoming, indi-
vidually and also as copartners doing business under
the name and style of Haley & Saunders, parties of
the first part, and Grand Canyon Cattle Company, a
corporation organized under the laws of the State of
California, party of the second part, the receipt
whereof is hereby acknowledged, do hereby grant,
bargain, sell, convey, assign, transfer, set over and
deliver to said party of the second part all personal
property of every name and description now located

within either the County of Mohave or the County of Coconino, in the Territory of Arizona, and on the 30th day of June, 1907, or at any time since, appertaining to or constituting a part of the equipment of or used, held or designed for use in connection with either of those two certain ranches located within said counties and commonly known, one as the V. T. Ranch and the other as the Canebed Ranch, including the good will of the business carried on on said ranches, and all pipes, pipe lines, tanks, fences, corrals, buildings, or other structures, wagons, vehicles, harness, saddles, machinery, tools, implements, materials, supplies, licenses, privileges and authorities which were on the 30th day of June, 1907, or at any time since have been used or held or designed to be used as a part of the equipment of either of said ranches or in connection with the carrying on of the business or operation to which said ranches were during said time devoted.

(Signed) HALEY & SAUNDERS.

ORA HALEY.

B. F. SAUNDERS.

Acknowledged December 5th, 1907, before James H. Ball, Notary Public, Salt Lake County, Utah, and recorded at request of E. J. Marshall, in the office of the County Recorder of Coconino County, Arizona, on May 24th, 1908, in Book 33 of Deeds at page 317. [295]

Government's Exhibit No. 36-P—Deed, Dated December 2, 1907, from B. F. Saunders and Ora Haley to Grand Canyon Cattle Co.

DEED, dated December 2d, 1907, between B. F. Saunders and Ora Haley, individually and as co-partners, under the name of Haley & Saunders, parties of the first part, and Grand Canyon Cattle Company, a corporation organized under the laws of the State of California, party of the second part.

Parties of the first part grant, bargain, sell, convey, assign, transfer, release and forever quit-claim unto the party of the second part, its successors and assigns, all the right, title, interest, estate, claim and demand, either at law or in equity, as well in possession as in expectancy of the parties of the first part or either of them in and to the following described property:

1st. That certain forty-acres of unsurveyed land at the mouth of Kane Canyon on the east side of the Buckskin Mountains in House Rock Valley, Coconino County, Arizona Territory, as set on the map made by John T. Breckson, United States Deputy Mineral Surveyor, filed in the office of the Register and Receiver of the United States Land Office at Prescott, Arizona, said forty acres being described as follows, to wit: From corner No. 1, which is a cedar post four feet long, four inches square and mound of stones marked Corner No. 1; thence east 1320 feet to Corner No. 2, a pine post marked Corner No. 2, thence north 1320 feet to Corner No. 3, a cedar post marked Cor-

ner No. 3; thence west 1320 feet to Corner No. 4, a cedar post and mound of stone marked Corner No. 4; thence south 1320 feet to Corner No. 1, the place of beginning. From Corner No. 1, the southeast corner of stone house 16x24 feet, bears north 26 degrees 30' east 345 feet distant.

2d. North Lake Tract, situate in the Buckskin Mountains, in the northern part of Coconino County, Arizona, particularly bounded and described as follows: Commencing at the southeast corner, or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to Corner No. 3, thence south 1320 feet to Corner No. 4, and thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 4 bears south 41 degrees west 895 feet distant from the center of the most northerly lake of the "Three Lakes," so-called, which latter are well known springs, land marks commonly and widely known by that designation. [296]

A pine tree 11 inches in diameter, bears north 39 degrees, 45' west 25.2 feet distant from Corner No. 1, at east corner of the tract is a post two inches square set in mound of rocks, three feet high, properly marked.

3d. Middle and South Lake, situate in the Buckskin Mountains, in the northern part of Coconino County, Arizona, particularly bounded and described as follows: Commencing at the southeast corner, or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to Corner No. 3, thence south 1320 feet to Corner No. 4, thence east 1320 feet to Corner No. 1, the place of beginning.

Corner No. 2, bears north 62 degrees 45' east, 345 feet distant from the center of the middle lake of the "Three Lakes," so-called, and north 50 degrees 30' east 995 feet distant from the center of the southerly lake of the "Three Lakes," so-called, which latter are well known springs, land marks commonly and widely known by that designation.

At east corner of the tract is a post two inches square set in mound of rocks, three feet high, properly marked.

4th. Jacobs Pools Tract, situate in House Rock Valley, in the northern part of Coconino County, Arizona, more particularly described and bounded as follows: Commencing at the southeast corner or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to Corner No. 3, thence south 1320 feet to Corner No. 4, thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 4, bears south 38 degrees 20' west 925 feet distant from the main or largest pool of "Jacobs Pools," so-called, the latter being well known springs, land marks widely and commonly known by that designation, and shown upon the official maps issued and published by the Commissioner of the General Land Office. At each corner of the tract is a post two inches square, set in a mound of rocks, three feet high, properly marked.

5th. Soap Creek tract, situated in House Rock Valley, in the northern part of Coconino County, Arizona, more particularly bounded and described as follows:

Commencing at the southeast corner or Corner No.

1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to Corner No. 3, thence south 1320 feet to Corner No. 4, thence east 1320 feet to corner No. 1, the place of beginning. Corner No. 2 bears south 34 degrees east 4170 feet from the [297] spring, which is the source of "Soap Creek," which latter is a well known creek, a land mark widely and commonly designated by that name, flowing into House Rock Valley, well known by that name.

At each corner of the tract is a post two inches square, set in a mound of rocks, three feet high, properly marked.

6th. House Rock Tract, situate in the House Rock Valley in the northern part of Coconino County, Arizona, more particularly bounded and described as follows: Commencing at the southeast corner, or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to Corner No. 3, thence south 1320 feet to Corner No. 4, thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 1 bears south 7 degrees east, 819 feet distant from House Rock Springs, a spring which is a land mark and widely and commonly known as such throughout Coconino County and northern Arizona and southern Utah. At each corner of the tract is a post, two inches square set in a mound of rocks, three feet high, properly marked.

7th. Two Mile Tract, situate in House Rock Valley, in the northern part of Coconino County, Arizona, more particularly bounded and described as follows: Commencing at the southeast corner, or Corner No. 1, and running thence north 1320 feet, to

Corner No. 2, thence west 1320 feet to Corner No. 3, thence south 1320 feet to Corner No. 4, thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 1 bears south 40 degrees east, 172 feet from "Two Mile" Spring, a well known spring, which is a land mark widely and commonly known by that designation throughout Coconino County and Northern Arizona and situated about two miles in a northerly direction from House Rock Spring. At each corner of the tract is a post, two inches square, set in a mound of rocks, three feet high, properly marked.

8th. One Mile Tract, situated in House Rock Valley, in the northern part of Coconino County, Arizona, more particularly bounded and described as follows: Commencing at the southeast corner, or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence West 1320 feet to Corner No. 3, thence south 1320 feet, to corner No. 4, thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 1, bears south 65 degrees, 40' east 81 feet distant from "One Mile" Spring, a well known spring, which is a land mark in Coconino [298] County and throughout northern Arizona and southern Utah, commonly and widely known by that designation, situate about one mile in a northerly direction from the well known House Rock Spring. At each corner of the tract is a post, two inches square, set in a mound of rocks, three feet high, properly marked.

9th. Canaan Reservoir Tract, situate in the northwest part of Coconino County, Arizona, about

15 miles from Utah State Line, more particularly described as follows, to wit: Commencing at the southeast corner or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to Corner No. 3, thence south 1320 feet to Corner No. 4, thence east 1320 feet to Corner No. 1, the place beginning. Corner No. 2, bears north 6 degrees east, 610 feet distant from the center of the Dam of Canaan Reservoir, which latter is a well known land mark throughout said county and all northern Arizona and southern Utah, and is situate south 20 degrees west about 10 miles distant from Pipe Springs, widely and commonly known as a land mark throughout northern Arizona and southern Utah.

At each corner of the tract is a post two inches square, set in a mound of rocks, three feet high, properly marked.

* * * The parties of the first part hereby warrant and covenant that they have not nor has either of them at any time since June 30th, 1907, sold, conveyed, released, abandoned or surrendered any right, title or interest claimed by them or either of them in or two any of the lands, easements, privileges, tenements, hereditaments or property of any description hereinbefore described or mentioned.

Signed, ORA HALEY,
B. F. SAUNDERS.

Acknowledged before James H. Ball, Notary public, Salt Lake County, Utah, December 5th, 1907.

Recorded in the office of the County Recorder, Coconino County, Arizona, January 2d, 1908. [299]

Government's Exhibit No. 37-P—Deed Dated December 2, 1907, from B. F. Saunders and Ora Haley to Grand Canyon Cattle Co.

DEED, dated December 2d, 1907, between B. F. Saunders, of Salt Lake City, Utah, and Ora Haley of Laramie, Wyoming, individually, and as copartners under the name of Haley & Saunders, parties of the first part, and Grand Canyon Cattle Company, a corporation organized under the laws of California, party of the second part.

Parties of the first part grant, bargain, sell, convey, assign, transfer, remise, release, and forever quitclaim to the party of the second part, its successors and assigns all the right, title, interest, claim and demand either at law or in equity, and as well in possession as in expectancy of the parties of the first part or either of them, of, in or to the whole or any part of the lands, tenements or hereditaments hereinafter described, or mentioned, as follows:

1st. All of the lands, premises, appurtenances and hereditaments described or mentioned in these ten (10) certain notices of location executed by said B. F. Saunders and recorded in the office of the recorder of Coconino County, Arizona, in manner as follows: Notice of location of Frank Mining Claim, being recorded in Book 5 of mines, at page 355; notice of location of Alaska Mining Claim being recorded in Book 5 of Mines, at page 361; Notice of Location of Crane Mining Claim being recorded in Book 5 of Mines, at page 356; Notice of Location of Snipe Mining Claim being recorded in Book 5 of

Mines, at page 358; Notice of Location, of Noonday Mining Claim being recorded in Book 5 of Mines, at page 357; Notice of Location of Alaska Mill Site being recorded in Book 1 of Millsites and Water Locations, at page 441; Notice of Kane Millsite being recorded in Book 1 of Millsites and water rights, at page 440; Notice of Location of Kane Lode Mining Claim, recorded in Book No. 5 of Mines, page 359, and U. S. Receiver's Receipt thereof recorded in Book 32 of Deeds, page 174; Notice of Location of Sunset Millsite being recorded in Book 1 of Millsites and water rights, at page 442; Notice of Location of Noonday Mining claim being recorded in Book 3 of Mines, at page 638, together with all rights, authorities and priorities which said parties or either of them may have to perfect or acquire full and complete title to all of said lands and premises. [300]

2d. All of the lands, premises, waters, and water rights claimed or mentioned in that certain Notice of Location executed by said B. F. Saunders and recorded in Book 1 of Millsites and water rights, at pages 228 and 229 of the records in the office of the county recorder of said Coconino County, also all of the lands, premises, waters and water rights named or mentioned in that certain Notice of Location executed by one James S. Emmett and recorded February 21st, 1900, in Book 1 of Water rights, at page 156 of the records in the recorder's office of said Coconino County.

3d. All of the lands, premises, appurtenances, hereditaments and real property, of every description described or mentioned in these five (5) certain

deeds, namely; First, a deed dated August 5th, 1899, executed by Thomas S. Kingsberry as grantor, to said Haley and Saunders, as grantees, and recorded in Book 9 of Deeds, at pages 483-485, of the records in the recorder's office of said Coconino County; second, a deed of date December 17th, 1900, and executed by Hyrum S. Shumway, as grantor to said B. F. Saunders, as grantee, and recorded in Book 9 of Deeds, at pages 486 and 487 of the records in the recorder's office of said Coconino County; third, a deed of date July 17th, 1907, executed by H. S. Cuttler as administrator of the estate of H. D. Rosecrans, deceased, as grantor, to said B. F. Saunders, as grantee, and recorded in Book — of Deeds at page — of the records in the recorder's office of Mohave County, Arizona; the property by said deed conveyed being therein described as follows: That certain ranch of said Rosecrans, deceased, situated in the northeast corner of said Mohave and joining the Canebeds Ranch now owned by grantee, together with all building, houses, barns, corrals, farming tools and all other improvements had and used in connection therewith; fourth, a deed of date September 17th, 1901, executed by H. S. Cutler and H. S. Jolley, as grantor, to said B. F. Saunders, grantee, and recorded in Book 14 of Deeds, at pages 350 and 351 of the records in the recorder's office of Mohave County, Arizona; fifth, a deed of date February 24th, 1899; executed by Fotheringham and Gillies, a copartnership, composed of A. L. Fotheringham and E. B. Gillies, as grantors, to T. S. Kingsberry, as grantee, and recorded, in Book 9 of Deeds at pages 480 and

482 of the records in the office of the county recorder of said Coconino County; sixth; a deed of date November 27th, 1900, executed by H. S. Cutler, James Cutler and H. S. Jolley, as grantors, to B. F. Saunders, as grantee, and recorded [301] in Book — of Deeds, at page — of the records in the recorder's office of said Coconino County; the property conveyed by said deed being therein described as follows: The Canebeds ranch, including the Rock House, corrals, all the fence and fencing enclosing the pasture and bull pasture; also Badger Spring and the line of pipe running from said spring to the water tank, together with said water tank; also point of Rock lake situated about ten miles in a southwesterly direction from Canebeds House."

4th. All lands, waters, water rights and leases, licenses and privileges authorizing the use or enjoyment of any lands and all tenements and hereditaments of every description, located within said County of Mohave or said County of Coconino, which on June 30th, 1907, or at any time since said date have constituted a part of or have been used or held to be used in connection with either of those certain ranches located within said counties and commonly known, one as the V. T. and the other as the Canebed ranch.

* * * The parties of the first part hereby warrant or covenant they have not, nor either of them at any time since June 30th, 1907, sold, conveyed, encumbered, released, abandoned or surrendered any right, title or interest claimed by them or either of them in or to any of the lands, waters, water rights, easements, leases, privileges, tenements,

hereditaments or property of any description here-
inbefore described or mentioned.

Signed,

ORA HALEY.

B. F. SAUNDERS.

Acknowledged before James H. Ball, notary public, Salt Lake County, Utah, December 5th, 1907. Recorded at request of E. J. Marshall, January 2d, 1908, in the office of the County Recorder, Coconino County, Arizona. [302]

Government's Exhibit No. 38-P—Deed Dated December 2, 1907, from B. F. Saunders to Grand Canyon Cattle Co.

THIS INDENTURE, made the 2d day of December, in the year nineteen hundred and seven, between B. F. Saunders, of Salt Lake City, State of Utah, party of the first part, and Grand Canyon Cattle Company, a corporation, organized under the laws of the State of California, party of the second part, Witnesseth:

That, the said party of the first part for a good and valuable consideration to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, and confirm unto the said party and to its successors and assigns forever all those certain parcels of real property situate in the County of Coconino, Territory of Arizona, and described as follows:

1st. That certain mining claim or premises known as the Emmett Lode Mining Claim located in

the Warm Springs Mining District and particularly described in that certain patent therefor dated October 20th, 1906, issued by the United States in favor of said party of the first part and recorded in the records of the County Recorder of said Coconino County, in Book 32 of Deeds, at pages 501-504.

2d. That certain mining claim or premises known as Jacob Lode Mining Claim situate in the Warm Springs Mining District and particularly described in a patent therefor of date March 18th, 1907, issued by the United States in favor of said party of the first part and recorded in Book 32 of Deeds, at pages 631-623 of the records in the Recorder's office of said Coconino County.

3d. That certain mining claim or premises known as the Sunset lode mining claim and Sunset Mill Site claim, located in the Warm Springs mining district and particularly described in a patent therefor of date June 9th, 1906, and issued by the United States in favor of said party of the first part and recorded in Book 32 of Deeds, at pages 374-377 of records in the recorder's office of said Coconino County.

4th. That certain mining claim or premises known as the Noonday Lode Mining Claim, located in Warm Springs Mining District, and particularly described in a patent therefor of date June 22d, 1907, and is issued by the United States in favor of said party of the first part, and recorded in Book 33 of Deeds, pages 290-292 of the records of the Recorder's office of said Coconino County. [303]

Together with all and singular the tenements, hereditaments and appurtenances thereunto belong-

ing or in any wise appertaining, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and to its successors and assigns forever. And the said party of the first part and his heirs, executors and administrators, the said premises in the quiet and peaceful possession of the said party of the second part, its successors and assigns, against the said party of the first part and his heirs, executors and administrators and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

Signed, B. F. SAUNDERS.

Acknowledged before James H. Ball, notary public, Salt Lake County, Utah, December 5th, 1907.

Recorded in the office of the County Recorder of Coconino County, Arizona, at the request of E. J. Marshall, January 2d, 1908. [304]

**Government's Exhibit No. 39-P—Mortgage Dated
December 2, 1907, from Grand Canyon Cattle
Co. to Ora Haley and B. F. Saunders.**

MORTGAGE.

Dated December 2d, 1907, made by the Grand Canyon Cattle Company, a corporation organized under the laws of California, party of the first part, and Ora Haley of Laramie, Wyoming, and B. F. Saunders, of Salt Lake City, Utah, parties of the second part.

Party of the first part for the purpose of securing payment of the sum of \$102,761.24, mortgages to parties of the second part a certain property situate in the counties of Coconino and Mohave, Arizona, to wit:

Emmett Lode Mining Claim, patented October 20th, 1906.

Jacob Lode Mining Claim, patented March 18th, 1907.

Sunset Lode Mining Claim and Sunset Mill Site Claim, patented June 9, 1906.

Noonday Lode Mining Claim, patented June 22d, 1907.

Also ten unpatented mining claims, notices of location of which are recorded in the office of the County Recorder as follows:

Frank Mining Claim, Book 5 of Mines, page 355;
Alaska Mining Claim, Book 5 of Mines, page 361;

Crane Mining Claim, Book 5 of Mines, page 356;
Snipe Mining Claim, Book 5 of Mines, page 358;
Noonday Mining Claim, Book 5 of Mines, page 357;

Alaska Mill Site, Book 1 of Mill Sites and Water Rights, page 441;

Kane Mill Site, Book 1 of Mill Sites and Water Rights, page 440;

Kane Lode Mining Claim, Book 5 of Mines, page 359;

Sunset Mill Site, Book 1 of Mill Sites and Water Rights, page 442;

Noonday Mining Claim, Book 3 of Mines, page 638;

Also all lands, premises and water rights mentioned in the certain notices of location as follows:

Location by B. F. Saunders, recorded in Book 1,
Mill Sites and Water Rights, pages 228-229.

Location executed by James S. Emmett, recorded
in Book 1, Mill Sites and Water Rights, at
page 156;

Also lands, premises, etc., described in five deeds,
as follows: [305]

Deed dated August 5th, 1899, Thomas S. Kingsberry to Haley and Saunders, recorded Book 9 of Deeds, pages 483-485.

Deed dated December 17th, 1900, Hyrum S. Shumway to B. F. Saunders, recorded Book 9 of Deeds, pages 486-487.

Deed dated July 17th, 1907, H. S. Cutler, administrator, to B. F. Saunders, recorded Book — of Deeds, pages —.

Deed dated September 17th, 1901, H. S. Cutler and H. S. Jolly to B. F. Saunders, recorded Book 14 of Deeds, pages 350-351.

Deed dated February 24th, 1899, A. L. Fotheringham and E. B. Gillies, partners as Fotheringham & Gillies to T. S. Kingsberry, recorded in Book 9 of Deeds, pages 480-482.

Deed dated November 27th, 1900, H. S. Cutler, James Cutler and H. S. Jolly to B. F. Saunders, conveying Canebeds Ranch and other property.

All lands, waters, water rights, leases, licenses and privileges situated within the County of Mohave or County of Coconino, which on June 30th, 1907 or at any time since that *that* date have been used in con-

nection with the V. T. Ranch and the Canebed Ranch; also forty acres of unsurveyed land and certain other tracts situated in said county of Coconino.

(The records above referred to are the records in the office of the County Recorder of Coconino County, Arizona.)

Signed, GRAND CANYON CATTLE COMPANY.

By E. J. MARSHALL,
President,
ROBT. BULTMAN,
Secretary.

Acknowledged before Laura M. McKeague, notary public, December 28th, 1907. Recorded January 8th, 1908, at request of B. F. Saunders, in the office of the County Recorder, Coconino County, Arizona.
[306]

**Government's Exhibit No. 40-P—Release of
Mortgage.**

Release of foregoing Mortgage,—Government's Exhibit No. 39-P.

Release dated June 10th, 1909, made by Ora Haley, personally on behalf of Haley & Saunders, a co-partnership.

Signed, ORA HALEY.

Acknowledged before James H. Ball, notary public, June 10th, 1909. Recorded June 16th, 1909, in the office of the County Recorder, Coconino County.
[307]

Government's Exhibit No. 49-P—Articles of Incorporation of the Grand Canyon Cattle Company.

**ARTICLES OF INCORPORATION OF THE
GRAND CANYON CATTLE COMPANY.**

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, the majority of whom are citizens and residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California,

AND WE HEREBY CERTIFY:

First. That the name of said corporation shall be Grand Canyon Cattle Company.

Second. That the purposes for which it is formed are as follows, to wit: To perform and carry on all acts, transactions and operations proper or necessary to be performed or carried on in connection with the conduct, management or enjoyment of the business of purchasing, raising or otherwise acquiring, holding, feeding, handling, selling and otherwise dealing in livestock of every description; to purchase, lease, locate or otherwise acquire, own, exchange, sell or otherwise dispose of, pledge, mortgage and hypothecate any and all kinds of real and personal property, including bonds and shares of capital stock of other corporations, mines, mining claims, oil lands, coal lands, water and water rights, and to work, cultivate, mine, operate, develop and enjoy the same; to borrow money and execute notes, bonds, mortgages or deeds of trust, to secure the same and to exercise in respect thereof, and of all shares of capital stock and other securities and obligations,

any and all rights, powers and privileges which natural persons owning the same might exercise and in general to do all things necessary to the proper conduct and accomplishment of the business and objects of the corporation.

Third. That the place where the principal business of said corporation is to be transacted is Los Angeles, California.

Fourth. That the term for which said corporation is to exist is fifty (50) years from and after the date of its incorporation.

Fifth. That the number of Directors of said corporation shall be five (5), and that the names and residences of the Directors who are appointed for the first year and to serve until the election and qualification of their successors are as follows, to wit:
[308]

Names.	Residences.
Henry J. Stevens,	Los Angeles, California.
E. E. Milliken,	Los Angeles, California.
William S. White,	Los Angeles, California.
Joseph P. Loeb,	Los Angeles, California.
Edwin J. Loeb,	Los Angeles, California.

Sixth. That the amount of the capital stock of said corporation is two hundred thousand dollars (\$200,000) and the number of shares into which it is divided is two thousand (2,000) of the par value of one hundred dollars (\$100) each.

Seventh. That the amount of said capital stock which has been actually subscribed is five hundred dollars (\$500) and the following are the names of the persons by whom the same has been subscribed and the amount subscribed by each of them to wit:

Name of Subscribers.	No. of Shares.	Amount.
Henry J. Stevens,	1	\$100.00
E. E. Millken,	1	\$100.00
William S. White,	1	\$100.00
Joseph P. Loeb,	1	\$100.00
Edwin J. Loeb,	1	\$100.00

In Witness Whereof, we have hereunto set our hands and seals this 30th day of September, 1907.

HENRY J. STEVENS. (Seal)

E. E. MILLIKEN. (Seal)

WM. S. WHITE. (Seal)

JOSEPH P. LOEB. (Seal)

EDWIN J. LOEB. (Seal)

Certificate of Acknowledgement by incorporators before Walter J. Lundy, Notary Public, on October 1st, 1907.

Certificate of County Clerk of Los Angeles County, California, and Secretary of the State of California, that the foregoing is a correct copy of the original Articles.

Endorsed: Filed in the office of the Secretary of State the 4th day of October, A. D. 1907.

C. F. CURRY,
Secretary of State,
By J. Hoesch,
Deputy.

Record Book 207, Page 70. [309]

Government's Exhibit No. 12—Affidavit of John T. Brecken (Excluded).

Affidavit of John T. Brecken, excluded by the Court, and omitted. [310]

Government's Exhibit 57-P—Letter, Dated March 10, 1908, Signed by E. J. Marshall.

(Forest Service Grazing,
Office of the Chief,
Mar. 13, 1908,
Received.)

Washington, D. C., March 10, 1908.

Dear Sir:

Referring to the matter of the purchase by the Grand Canyon Cattle Company of Arizona, of B. F. Saunders, of Salt Lake City, of the livestock and improvements going to make up what is commonly known as the VT cattle proposition, located in Coconino, Arizona, and the notice recently served on Mr. Dimmick, Superintendent of the Grand Canon Cattle Company, directing that he make such arrangements as would enable the Forest Rangers to count the cattle going into the Forest Reserve in the Spring of 1908, we beg to respectfully submit that while we have no objection to a count being made of our cattle entering the Reserve, yet we believe that the number of cattle for which we have applied for grazing permits fully covers the number of cattle likely to enter the reserve to graze during

the season of 1908. In substantiation of this statement we beg to state that under the terms of our purchase from B. F. Saunders, we received and tally-branded 8,073 head of cattle up to November 1st, 1907; included in this number were 2,020 calves, many of which on November 1st were less than sixty days old; also included in this number were 1299 head of cattle received and tallied on the Canebed Ranch, situate seventy-five miles west of Buckskin Mountain and in Mohave County. Rather than subject the cattle to numerous round-ups in order to receive and tally the balance of the cattle included in the purchase of B. F. Saunders a compromise agreement was reached whereby we accepted range delivery and paid him for 10,000 head of cattle, accepting a bill of sale for the Z. BRAND. We believe, therefore, in asking for grazing permits for 2,000 head of cattle for the entire year, and 6,000 head for the summer season of 1908, that we have asked for permits covering as many of our cattle as are at all likely to enter the Forest Reserve at any time during the year, as we expect to maintain on the range of our Canebed Ranch at least 2,000 head of cattle. We further submit that if you accept our statement of facts as we here present them and will save us the trouble of rounding up cattle that are now ranging over a very extensive range that you will render us a very [311] great service at this particular time inasmuch as the cattle have not had a favorable winter season, and are not likely to be in

as good flesh as in ordinary Spring seasons.

Very truly,

GRAND CANYON CATTLE COMPANY.

By E. J. MARSHALL,

President.

The Forester,

Forestry Division,

Department of Agriculture,

Washington, D. C. [312]

**Government's Exhibit No. 28-P — Letter, Dated
March 30, 1908, Signed by E. J. Marshall to A. F.
Potter.**

Grand Canyon Cattle Company, Office of the
President.

Los Angeles, California, March 30th, 1908.

Mr. A. F. Potter, Assistant Forester,

Forest Service, Dept. of Agriculture,

Washington, D. C.

Dear Sir:

Enclosed please find letters from Mr. John H. Clark, Acting Supervisor of the Grand Canyon Forest Service, the one of March 20th having reference to the cutting down of our application for grazing permits from 8,000 to 6,000 head of cattle, and one bearing date March 24th, having reference particularly to the counting of our cattle as they go onto the Reserve in the spring of 1908, Remittances covering the grazing permits for 6,000 head of cattle for the summer season and 2,000 head of cattle for the winter season only, and 200 head of horses during the entire year, are going forward today to Mr. H. B. Cramer,

Fiscal Agent, Forest Service at Washington. You will note that Mr. Clark refers to the fact that we no doubt can take care of 2,000 head of cattle on the public lands. Mr. Clark, no doubt is not aware, that as summer advances it would require an army of men to keep cattle from leaving House Rock Valley and entering Buckskin Mountain. House Rock Valley is purely a winter range, and, as you must know, has many miles of territory, north and south. Cattle could not be maintained on this range, even though it were possible. It is as natural for cattle to leave this valley and enter the mountains through the various canyons, as spring advances, as it is that they should leave the mountains, driven out by snow in the fall, and again seek the House Rock Valley lands, their natural winter pasture. We cannot help but believe that the interests of this company are not being properly regarded by your acting supervisor, Mr. Clark. We have reason to believe that he is acting specially in the interest of the cattle men living in Utah, and that special efforts are being made this year, to grant summer grazing permits to ranch men whose ranches are far distant from Buckskin Mountain or the Grand Canyon Forest Reserve, and to the extent that these new people are willing to send cattle into the Buckskin Mountain, is the Grand Canyon Cattle Company to be cut down. It appears to us that this is neither in accordance with law, [313] nor is it the proper treatment we naturally would expect to receive at the hands of your local supervisor.

We are under the impression that through the purchase of all of the lands, all of the water rights, and

all of the improvements, together with the entire stock of cattle and horses formerly owned by B. F. Saunders, and pastured on Buckskin Mountain for the last twenty years, that we would be entitled, not so much to the special privileges heretofore enjoyed by Mr. Saunders, through personal inheritance, but at least to the grazing privileges enjoyed by him, as against any other applicants for grazing privileges, except applicants who were or had become *bona fide* settlers on the nearby public lands or on the actual Forest Service lands. We feel quite sure, from correspondence had with your Supervisor, Mr. Clark, that it is his construction of the law, that he must treat us as newcomers into the Grand Canyon Forest Reserve, and that he is accepting applications for the grazing privileges on Buckskin Mountain for the summer season of 1908 from parties who are not entitled, in our judgment, to be recognized, until after our needs have been supplied. This is our view of the situation after our conference with you and Mr. Pincho during our recent visit to Washington.

We beg therefore to ask if you cannot put us in better standing with your Supervisor, to the end that we may obtain through him, our just deserts, without the necessity of applying to your office. We dislike exceedingly to feel that your Supervisor, Mr. Clark, is intentionally operating against us, and in the interest of far-distant Utah ranchmen, although we are at this time almost forced to believe this is true. We much prefer to believe, however, that he is mistaken in his interpretation of the law.

We are also enclosing copy of our letter to the Su-

pervisor, of even date, in answer to his letter of March 24th, in reference to the counting of the cattle of this company as they enter the Reserve. We are in receipt of recent information to the effect that on account of very little rain and snow this year, cattle are not holding their own, and unless we have rain and warm weather within the next thirty days, we shall have very poor cattle before the time of their entering the Mountain ranges. If this is true, a very great loss will ensue for us if we are made to round up these cattle over such a vast range for the purpose of counting before they enter the Reserve.

Very truly,

E. J. MARSHALL,
President.

E. J. M-M. Enc. [314]

Los Angeles, California, March 30th, 1908.

Mr. John H. Clark, Acting Supervisor,
Forest Service, Kanab, Utah.

Dear Sir:

Your valued favor of 24th inst., is received. We note that the statement of the cost of the south half of the V. T. Park house has been transmitted to Washington, that payment may be arranged therefor.

While in the East recently, and in company with Mr. A. A. Anderson of New York City, formerly Superintendent of the Yellowstone Park Forest Reserve, and one of the most ardent supporters of the Forest Service, I called on Mr. Pincho in Washington, for a conference in regard to Forest Service regulations, and more particularly as regards the exact position of the Grand Canyon Cattle Company,

with reference to grazing privileges in the Grand Canyon Forest Reserve. While there, I gave the Department full information as to the nature of the B. F. Saunders sale to this Company, and exhibited statements showing the number of cattle counted and tally-branded, and the number finally decided on between Mr. Saunders and Mr. Stephenson, as the representative of this Company, as being the full number of cattle in the Bar "Z" brand, as of November 1st, 1907. As a result of our statements, we were informed that it would not be necessary for the Forest Service to make a count of our cattle going into the Reserve for the spring and summer of 1908. We have so advised Mr. Dimmick, our Foreman, and no doubt you will receive in due course of mail, information of a similar nature, from the Forest Service in Washington.

We gathered, as a result of our investigations, and from information derived from the Forest Service office in Washington, that the Grand Canyon Cattle Company, by reason of its purchase of B. F. Saunders of his ranch plant, and of all his live stock, is entitled to the same recognition in the matter of grazing privileges as B. F. Saunders would have been entitled to had he not made a sale to us. We feel, therefore, that our claims for pasture privileges are not being fairly considered by your office, and that you are classing us as an entirely new party seeking grazing privileges in the Grand Canyon Forest Reserve for the first time. We believe that our position entitles us to a preference in grazing privileges over new applicants who have not heretofore grazed [315] cattle on the Reserve, unless such applicants are *bona fide* settlers on

the public lands adjacent to the Reserve or on lands a part of the Forest Reserve.

We beg therefore to ask for a reconsideration of your decision to grant us a permit for but 6,000 head of cattle for the summer season of 1908, on account of applications from other parties for such a quantity as makes it necessary for you to reduce your allotment to this company. Very truly,

President.

E. J. M-M. [316]

**Government's Exhibit No. 29-P — Letter, Dated
April 22, 1909, from E. J. Marshall to Clyde
Leavitt.**

Grand Canyon Cattle Company, Office of the President,
Wilcox Building.

Los Angeles, California, April 22d, 1909.

Mr. Clyde Leavitt,
District Forester,
Dept. of Agriculture,
Ogden, Utah.

My Dear Mr. Leavitt:

In pursuance of the agreement had with you and Mr. Potter during our conference at Ogden on the 10th inst., we herewith inclose for your information the following papers:

Affidavit of B. F. Saunders,

Affidavit of H. S. Stephenson and E. J. Marshall,

Statement of cattle operations.

The affidavit of B. F. Saunders refers to the pur-

chase by this company of all of the cattle owned by Saunders, of the manner of tallying said cattle, and of the final settlement on the basis of 10,000 head.

The affidavit of Mr. Stephenson and myself refers to the statement of cattle operations, which statement shows the number tallied during the Saunders roundup; the number settled for with Mr. Saunders, showing estimated number in each class going to make up the total of 10,000 head; the number of cattle of each class moved off of the range and out of the state during the year 1908; the number of cattle purchased and left on the ranch during the same period of time, and the number of calves branded during the same period of time.

In this statement we show an estimated loss of 5%. We do not know whether or not 5% will cover the loss in any one year. We only know that 5% is generally accepted by conservative ranchmen as covering losses from all causes, and we have adopted that figure in our own accounts.

From reports just received from our Superintendent, Mr. Dimmick, we are threatened with quite severe loss in House Rock Valley for the winter and spring, and we seriously question whether we will get through this year with the loss reported. [317]

Our affidavit further refers to the number of cattle now being run at Kanebeds, none of which cattle will go back to House Rock Valley or Buckskin Mountain, but on the contrary will come out and be shipped to California during the spring, summer and fall. Indeed, arrangements are now being made to pasture from 800 to 1000 head of the aged steers now running

at Kanebeds on the Panguesch Reserve.

We shall be glad to furnish you from time to time, when changes take place in the location of our steers, reports showing the movements of any of our cattle taken away or left on our ranges. We shall further be glad to furnish you monthly, quarterly or annually, the report of our manager as to the number of calves branded.

We trust the information furnished herewith will entirely satisfy your needs.

Thanking you for the courtesy extended us during the conference on the 10th inst., we beg to remain,

Very truly,

E. J. MARSHALL,

President.

(E-J-M) Incs. [318]

State of California,

County of Los Angeles,—ss.

This it to certify that the inclosed is a true and correct statement, showing all of the cattle transactions of the Grand Canyon Cattle Company from November 1st, 1907, to December 31st, 1908.

This is to further certify, that 12,878 head of cattle as shown in the estimate as being the total number of cattle owned by said Grand Canyon Cattle Company as of the 31st day of December, 1908, and located in Coconino and Mohave Counties, at least three thousand head of said total number are now located on what is commonly known as the Kanebeds Range, about seventy-five miles west of Buckskin Mountain, and that it is not the intention of this company to take to Buckskin Mountain for the grazing season of 1909,

any of the cattle so located.

This is to further certify that included in this number, are all calves born, marked and branded on the ranch to December 31st, 1908, and that about 200 calves as shown, were branded in the months of November and December.

This is to further certify that it is the intention of this company to remove from House Rock Valley and Buckskin Mountains during the early summer, from 300 to 500 old cows and possibly 500 three-year-old steers, or as many as can easily be gathered.

This is to further certify that in the opinion of the undersigned, that there will not be pastured on the range of the Kaibab Forest Reserve during the grazing season of 1909 in excess of 9,000 head of cattle belonging to this company.

Witness our hands this 20th day of April, 1909.

H. S. STEPHENSON.

E. J. MARSHALL.

Subscribed and sworn to before me this 20th day of April, 1909.

[Seal]

LAURA M. McKEAGUE,

Notary Public in and for Los Angeles County, State of California. [319]

State of California,

County of Los Angeles,—ss.

This is to certify that under the terms of the sale on the part of Saunders & Haley to the Grand Canyon Cattle Company, of all of the real estate, personal property and live stock owned in connection with what is commonly known as the V. T. Ranch proposition in Coconino and Mohave Counties, in the Terri-

tory of Arizona, that in the months of October and November, 1907, there were gathered, counted and tally branded, under the supervision of a representative of both the seller and the buyer, cattle to the number of eight thousand and seventy-three (8,073), classed as follows:

Old cows,	675
Cows,	2,106
Heifers, 2-year-old,	431
Heifers, yearlings,	659
Heifers, calves,	1,041
Steers, 3-year-old,	114
" 2-year-old,	270
" Yearlings,	1,484
" calves,	979
Bulls,	177
Old bulls,	137
Total,	8,073

Of said number, there were gathered, counted and branded on Buckskin Mountain and House Rock Valley, 6,774 head. On Kanebeds Range, about seventy-five miles west of Buckskin Mountain, 1,299 head.

This is to further certify that in lieu of making any further efforts to gather, count and tally brand additional cattle during a period of twelve months beginning November 1st, 1907, as was allowed Saunders & Haley, under their sale agreement with the Grand Canyon Cattle Company, it was mutually agreed between the parties to settle on the basis of 10,000 head of live stock, as making up all of the live stock in the Z S W brands, being all of the brands under which cattle were run in the counties named.

I hereby further certify that settlement was made to Saunders & Haley by the Grand Canyon Cattle Company on December 2d, 1907, on the basis of 10,000 head of live stock. Witness my hand this 20th day of April, 1909.

B. F. SAUNDERS.

Subscribed and sworn to before me this 20th day of April, 1909.

[Seal] LAURA M. McKEAGUE,
Notary public in and for Los Angeles County, State
of California. [320]

GRAND CANYON CATTLE COMPANY.

Cattle Statistics.

1908.

					5%			
	Tallied, 11/1-07	Estimate, 1/1 08	Bought,	Calves,	Sold,	Loss,	Estimate, 12/31 08	
Old cows,	675	800			528	40	172	
Cows,	2,106	3,125	1			155	2,971	
Heifers,	2's 431	824				40	784	
	1's 659	1,300				65	1,235	
Steers,	3's 114	480	402		480	24	378	
	2's 270	1,855	362		28	92	2,097	
	1's 1,484	1,234	956			61	2,119	
Bulls,	177	221	100			11	310	
Old bulls,	137	171			76	8	87	
Calves, H.	1,041			1,412		70	1,342	
s	979			1,455		72	1,383	
<hr/>								
	8,073	10,000	1,821	2,867	1,172	638	12,878	

Los Angeles, California, March 31st, 1909.

[321]

**Government's Exhibit No. 41-P—Decision of
General Land Office.**

Certified Copy of Decision of the General Land
Office.

“Department of the Interior,
General Land Office,
Washington,

September 18, 1913.

Location adjudged invalid.

Case closed.

Register and Receiver,
Phoenix, Arizona.

Sirs:

By office letter “P,” dated October 21, 1912, you were directed to proceed under circular of January 19, 1911, against the Crane Lode location, made February 18, 1904, by B. F. Saunders, Salt Lake City, Utah, covering a tract of land in approximately unsurveyed T. 36 N., R. 2 E., G & S. R. B & M., on Buckskin Mountain about fifteen miles south of Jacob's Lake, and within the Kaibab National Forest, notice of which is of record in Book 5 of Mines, page 356, at Flagstaff, Arizona, Grand Canyon Cattle Company of 516 Wilcox Building, Los Angeles, California, present claimant and in the notice provided by said circular to state that a forest officer charged that no discovery of mineral had been made upon the land; that said land was not mineral in character, and that the location was not made for the purpose of developing mineral resources, but for the purpose of fraudu-

lently obtaining title to a tract of land whose chief value is for stock watering purposes.

By letter dated May 31, 1913, you reported that notice of said charges was duly given the claimant; that it filed answer thereto and asked for a hearing; and that, on March 31, 1913, the answer was withdrawn by the claimant, since which time no action has been taken. [322]

The denial of the charges and request for a hearing having been withdrawn, the claimant is in default under Paragraph 10 of said circular, and said charges are taken as true. Said asserted mining location is, therefore, hereby adjudged to be wholly null and void, and the land covered thereby will be administered as a part of the public domain, subject to the reservation for forestry purposes, without regard to the so-called location.

(H. H. Yard et al., 38 L. D., 59.)

The case is hereby closed. So note your records and advise claimant.

Very respectfully,

CLAY TALLMAN,

Commissioner.

BOARD of LAW REVIEW. By W. B. PUGH.
9/13/13 McC. [323]

**Government's Exhibit No. 42-P—Decision of
General Land Office.**

Certified Copy of Decision General Land Office.

Decision in the same language as Government's Exhibit No. 41-P, except it cancels Frank Lode Mining Claim, made February 18th, 1904, by B. F. Saun-

ders, situated about twelve miles southwest of Jacobs Lake.

Location Notice, Recorded in Book 5 of Mines, page 355. [324]

**Government's Exhibit No. 43-P—Decision of
General Land Office.**

Certified Copy of Decision of General Land Office.

Decision in same language as Government's Exhibit No. 41-P, except it cancels Noonday Lode location, made February 18th, 1904, by B. F. Saunders, situate on Buckskin Mountain about five miles southeast of Three Lakes and ten miles south of Jacobs Lake. Location recorded in Book 5 of Mines, page 359. [325]

**Government's Exhibit No. 44-P—Decision of
General Land Office.**

Certified Copy of Decision General Land Office.

Decision in the same language as Government's Exhibit No. 41-P, except it cancels Snipe Lode Claim, location made February 17th, 1904, by B. F. Saunders, situated about five miles southeast Three Lakes and ten miles southeast of Jacobs Lake.

Location recorded in Book 5 of Mines, page 358. [326]

**Government's Exhibit No. 45-P—Decision of
General Land Office.**

Certified Copy of Decision General Land Office.

Decision in the same language as Government's

Exhibit No. 41-P, except it cancels Alaska Millsite, location made February 18, 1904, by B. F. Saunders, situated on the Fracas Lake, about one mile west of Three Lakes.

Location recorded in Book 1 of Mill Sites, page 441. [327]

**Government's Exhibit No. 46-P—Decision of
General Land Office.**

Certified Copy of Decision General Land Office.

Decision in the same language as Government's Exhibit No. 41-P, except it cancels Alaska Lode, location made February 19, 1904, by B. F. Saunders, situated on Buckskin Mountain, about one mile south of Three Lakes.

Location recorded in Book 5 of Mines, page 361. [328]

**Government's Exhibit No. 47-P — Forest Reserve
Lieu Selection Made by F. A. Hyde.**

Forest Reserve Lieu Selection. F. A. Hyde & Company, a corporation, by Benjamin F. Saunders, attorney in fact, relinquish to the United States certain lands in Fresno County, California, and select in lieu thereof the lands specified in the following Forest Reserve Lieu Application:

U. S. Land Office at Prescott, Arizona,

September 24th, 1900.

Notice is hereby given that F. A. Hyde & Co. (Inc.), whose postoffice address is San Francisco, California, has this day made application to select under the provisions of the Act of June 4th, 1897 (30

Stat. 36) the following described tracts of unsurveyed land, each and every tract containing 40 acres, all situate in Coconino County, in Prescott Land District, Territory of Arizona, and containing in all 160 acres, viz:

(1) "House Rock" tract, situate in the House Rock Valley, in the northern part of Coconino County, Arizona, more particularly bounded and described as follows: Commencing at the southeast corner or Corner No. 1, and running thence north 1320 feet to Corner No. 2; thence west 1320 feet to Corner No. 3; thence south 1320 feet to Corner No. 4; thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 1 bears south 7 degrees east 819 feet distant from House Rock Spring, a spring which is a landmark, and widely and commonly known as such throughout Coconino County and Northern Arizona and Southern Utah.

At each corner of the tract is a post two inches square set in a mound of rocks three feet high, properly marked.

(2) "Two Mile" tract, situate in House Rock Valley, in the northern part of Coconino County, Arizona, more particularly bounded and described as follows: Commencing at the southeast corner of Corner No. 1, and running thence north 1320 feet to Corner No. 2; thence west 1320 feet to Corner No. 3; thence south 1320 feet to Corner No. 4; thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 1 bears south 40 degrees east 172 feet from "Two Mile" spring, a well-known spring which is a landmark widely and commonly known

by that designation throughout Coconino County and Northern Arizona, and situated about two miles in a northerly direction from House Rock Spring. [329]

At each corner of the tract is a post two inches square set in a mound of rocks three feet high, properly marked.

(3) "One Mile" tract, situate in House Rock Valley, in the northern part of Coconino County, Arizona, more particularly bounded and described as follows: Commencing at the southeast corner of Corner No. 1, and running thence north 1320 feet to Corner No. 2; thence west 1320 feet to Corner No. 3; thence south 1320 feet to Corner No. 4; thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 1 bears south 65 degrees 40' east 81 feet distant from "One Mile" spring, a well-known spring which is a landmark in Coconino County and throughout Northern Arizona and Southern Utah, commonly and widely known by that designation, situate about one mile in a northerly direction from the well-known House Rock Spring.

At each corner of the tract is a post two inches square set in a mound of rocks three feet high properly marked.

(4) "Canaan Reservoir" tract, situate in the northwest part of Coconino County, Arizona, about 15 miles from Utah State line, more particularly described as follows, to wit: Commencing at the southeast corner of Corner No. 1, and running thence north 1320 feet to Corner No. 2; thence west 1320 feet to Corner No. 3; thence south 1320 feet to Cor-

ner No. 4; thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 2 bears north 6 degrees east 610 feet distant from the center of the dam of Canaan Reservoir, which latter is a well-known landmark throughout said county and all northern Arizona, and southern Utah, and is situate south 20 degrees west about 10 miles distant from Pipe Springs, widely and commonly known as a landmark throughout northern Arizona and southern Utah.

At each corner of the tract is a post two inches square set in a mound of rocks three feet high properly marked.

Papers executed by Benjamin F. Saunders, attorney in fact for F. A. Hyde & Company, a corporation, nonmineral and nonoccupancy affidavit, made as follows:

H. S. Stephenson being duly sworn according to law deposes and says that he makes this affidavit for F. A. Hyde & Company, who is an applicant for government title to the tracts hereto attached and described by metes and bounds. (Here follows description of land as in Forest Reserve Lieu Application of this exhibit.) [330]

* * * "that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold,

silver, cinnabar, lead, tin, or copper, or any deposit of coal; and that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that the said land is essentially non-mineral land, and that his application therefore is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes; that the said land is unoccupied by anyone other than the selector or his agents; and that there is not within the limits of said land any salt spring or deposit of salt in any form to make it chiefly valuable therefor; that it is not claimed by any Indian. My postoffice address is 224 H. W. Hellman Building, Los Angeles, Calif.

H. S. STEPHENSON.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Los Angeles, Calif., within the land district, on this 31st day of January, 1901.

L. B. JORALMON,

Notary Public in and for the County of Los Angeles,
State of California." [331]

**Government's Exhibit No. 48-P — Lieu Selection
Made by Mary E. Coffin.**

Lieu selection made by Mary E. Coffin, by Benjamin F. Saunders, attorney in fact.

Mary E. Coffin and husband relinquishes to the United States certain lands within the County of Socorro, Territory of New Mexico, included within the Gila River Forest Reservation, and selects in lieu thereof the lands hereinafter described in Forest Reserve Lieu Application, as follows:

FOREST RESERVE LIEU APPLICATION.

U. S. Land Office at Prescott, Arizona,

September 24, 1900.

Notice is hereby given that Mary E. Coffin, whose postoffice address is Duluth, Minnesota, has this day made application to select under the provisions of the Act of June 4, 1897 (30 Stat. 36), the following described tracts of unsurveyed land, each and every tract containing 40 acres, all situate in Coconino County, in Prescott Land District, Territory of Arizona, and containing in all 160 acres, viz:

(1) "North Lake" tract, situate in the Buckskin Mountains in the northern part of Coconino County, Arizona, particularly bounded and described as follows: Commencing at the southeast corner or Corner No. 1, and running thence North 1320 feet to corner No. 2, thence west 1320 feet to corner No. 3, thence south 1320 feet to corner No. 4, and thence east 1320 feet to corner No. 1, the place of beginning. Corner No. 4 bears south 41 Deg. west 895 feet distant from the center of the most northerly lake of the "Three

Lakes" so-called, which latter are well-known springs, landmarks commonly and widely known by that designation.

A pine tree, 11 inches in diameter bears north 31 degrees, 45' west, 25.2 feet distant from corner No. 1. At each corner of the tract is a post two inches square set in a mound of rocks three feet high, properly marked.

(2) "Middle and South Lake" tract situate in the Buckskin Mountains in the northern part of Coconino County, Arizona, particularly bounded and described as follows: [332]

Commencing at the southeast corner or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to corner No. 3, thence south 1320 feet to corner No. 4, thence east 1320 feet to corner No. 1, the place of beginning. Corner No. 2 bears north 62 degrees 45' east, 845 feet distant from the center of the middle lake of the "Three Lakes," so-called, and north 50 degrees 30' east 995 feet distant from the center of the southerly lake of the "Three Lakes" so-called, which latter are well known springs, landmarks widely and commonly known by that designation. At each corner of the tract is a post two inches square set in mound of rocks three feet high, properly marked.

(3) "Jacobs Pools" tract, situate in House Rock Valley, in the northern part of Coconino County, Arizona, more particularly described and bounded as follows: Commencing at the southeast corner or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to corner No. 3,

thence south 1320 feet to Corner No. 4, thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 4 bears south 38 degrees 20' west 925 feet distant from the main or largest pool of "Jacobs Pools," so-called, the latter being well known springs, landmarks widely and commonly known by that designation, and shown upon the official maps issued and published by the Commissioner of the General Land Office. At each corner of the tract is a post two inches square set in a mound of rocks three feet high, properly marked.

(4) "Soap Creek" tract, situate in House Rock Valley in the northern part of Coconino County, Arizona, more particularly bounded and described as follows: Commencing at the southeast corner or Corner No. 1, and running thence north 1320 feet to Corner No. 2, thence west 1320 feet to Corner No. 3, thence south 1320 feet to Corner No. 4, thence east 1320 feet to Corner No. 1, the place of beginning. Corner No. 2 bears south 34 degrees east 4170 feet from the spring which is the source of Soap Creek, which latter is a well-known creek, a landmark widely and commonly designated by that name flowing into House Rock Valley, well known by that name.

At each corner of the tract is a post two inches square set in a mound of rock three feet high, properly marked.

Then follows various papers executed by Benjamin F. Saunders, attorney in fact for Mary E. Coffin and Herbert W. Coffin, her husband. [333]

Government's Exhibit No. 22—Assay Certificate.

Union Assay Office,

Salt Lake City, Utah, Dec. 9, 1908.

Sample Serial, 1187-9.

Shipper, W. L. Walker.

Results per ton of 2000 Pounds.

No. Class,	Gold Value	Silver	Lead	Copper	Insol.	Zinc.	Sulphur,	Speiss,	Iron
	Ozs. Gold.	Ozs. per	per	per	per	per	per	per	per
	per	per	cent.	cent	cent.	cent.	cent.	cent.	cent.
	ton.	ton.		wet.					
11—35-a-	None	None		Trace	Weight—7.7	oz.		Avd.	
11—35-b-	"	"		"					
11—37-a-	"	"		"	" —5.4	"			

UNION ASSAY OFFICE,

Charges, \$4.50.

Per J. W. Sadler. [334]

Defendant's Exhibit "B" — Memorandum Agreement Dated July 30, 1907.

Salt Lake City, Utah, July 30th, 1907.

MEMORANDUM OF AGREEMENT made by and between Ora Haley, of Laramie, Wyoming, and B. F. Saunders, of Salt Lake City, Utah, copartners doing business as Haley & Saunders, parties of the first part, and E. J. Marshall, of Los Angeles, California, party of the second part, WITNESSETH:

THAT, WHEREAS, said first parties claim to be the owners of all property, real, personal and mixed, which constitutes a part of, is in any manner connected with or appertains to the business, plants or equipment of these two certain ranches located in the counties of Coconino and Mohave, Territory of

Arizona, one of said ranches being commonly known as the V. T. Ranch, and the other as the Cane-Bed Ranch, or either of said ranches, and claim to be the owners of all existing rights, tiles and interests of every name and description other than such rights or titles as may be vested in the United States in and to all and every part of the lands, waters, easements, tenements and hereditaments which now constitute a part of or appertain to either of said ranches or ranch properties, or are used or designed or intended for use in connection with said properties or any part thereof, or the business conducted on said ranches, and that among the land so claimed by said first parties are six certain tracts containing forty (40) acres each, and acquired by and through locations made with Forest Reserve scrip, and approved by the proper officials of the United States Land Office having jurisdiction of said lands; upon one of said tracts there being located springs and watering places known as One Mile Spring, and upon another the Two Mile Spring, and upon another the House Rock Spring, and upon another the watering place known as Jacobs Pools, and upon another the waters known as Three Lakes, and upon another the waters known as Soap Creek, and that there is also included among said lands five certain patented mining claims as follows: One known as Jacob's Lode, located on Jacob's Lake; another known as Emmett lode, located near Emmett Springs; another known as Noonday lode and Mill site, located near One Mile Spring; another known as Sunset lode mill site, lo-

cated east of and near to Jacob's Pool, and that there is also included among said lands four certain existing and valid mining and mill site locations as follows: One known as Kane Lode and Mill Site, [335] located near Kane Springs; another known as Alaska lode and mill site, located near 11½ Miles Camp; another known as Crane mining claim, located near Crane Lake; and another known as Snipe mining claim. Also included among those lands are two certain desert claim locations, one of 320 acres and the other of 40 acres, acquired with Forest Reserve scrip, intended to be used as a reservoir site in connection with Cane-Bed ranch. And also included among said ranch property and equipments are houses, corrals, fences, wagons, farming implements, harnesses and more than twenty-four (24) miles of pipe line, used for carrying water; and there is also included in said properties between twelve thousand and fourteen thousand head of stock cattle consisting approximately of 320 thoroughbred registered bulls, 4,358 cows, 1,087 two year old heifers, 1,367 one year old heifers, 500 steers, two years old and up, 1,950 one year old steers, and 3,000 calves; all of said cattle with the exception of from 600 to 800 head being in the straight bar Z (Z) brand; there is also included in said property about one hundred and seventy-five (175) saddle, range and work horses, pack mules, trail and pack horses (it being the intention of the parties hereto that all horses located upon or appertaining to either of said ranch properties on the 30th day of June, 1907, shall be

included herein), and that all of said livestock, including said horses and cattle, are now located on said lands and ranches of said parties of the first part or ranging on adjoining government lands, including the Forest Reserve of Buckskin Mountain lying west and north of the Grand Canyon of the Colorado River and in said counties; and that there is also included among said properties certain shares of the par value of at least four thousand (\$4,000) dollars of the stock of a corporation engaged in the business of raising buffalo and *cataloe*, and now operating on government lands lying west of the Colorado River and southwest from Lee's Ferry in said County of Coconino; and

WHEREAS, said first parties have offered to sell, transfer and convey all of their right, title and interest in and to said properties to said second party for a certain price and upon certain terms and conditions as to delivery of said property and payment of said prices; and [336]

WHEREAS, said second party is willing to purchase the same for said price and upon said terms and conditions, and WHEREAS said second party has personally and through his agent examined said properties, and WHEREAS both of said parties are desirous that the terms and condition of said agreement to sell and purchase shall be put in writing;

NOW, THEREFORE, said first parties hereby promise and agree to sell, transfer, convey and deliver to said second party and said second party hereby agrees to buy all of the livestock and personal property of every description hereinbefore mentioned;

also, all of the right, title and interest in or to the lands, tenements and hereditaments hereinbefore mentioned, of which said first parties, or either of them, individually or as copartners are the owners for the following price, to wit: The sum of fifty thousand dollars (\$50,000) for all of said property, excepting only said livestock, and the sum of sixteen dollars (\$16) per head for all livestock of the above description delivered to said second party by said first parties in the manner and within the time hereinafter provided; it being understood and agreed that the first parties shall furnish warranty deeds conveying all patented lands and mining claims and quitclaim deeds conveying all the right, title and interest of said first parties, or either of them, in or to the other lands, tenements, hereditaments, rights and franchises and said quitclaim deeds shall contain covenants on the part of the said first parties and each of them to the effect that they, or either of them, have not at any time since June 30th, 1907, sold, conveyed, encumbered, released, abandoned or surrendered any right, title or interest in or to said lands, tenements, hereditaments, or any part thereof which they, or either of them, owned or claimed on June 30th, 1907; all of said conveyances must be executed and delivered prior to November 1st, 1907.

Said first parties hereby agree to transfer, convey and deliver to said second party on or before the first day of November, 1907, at said ranches, all of said cattle that it is possible to gather and deliver at said date through the exercise of reasonable diligence by said first parties; and all of the other property of

every name and description hereinbefore mentioned, excepting only any balance of said estimated lot of cattle which it is not possible for said first parties to deliver at that date through the exercise of reasonable diligence. Said transfers and conveyances to cover also the good will of the business now being conducted on said ranches, and all shares of the capital [337] stock of the corporation above referred to, engaged in raising buffalo and catalos, now owned and controlled by said first party, whether the par value of the same exceeds four thousand dollars or not; also to transfer all permits issued by any department of the United States Government and now held by said first parties authorizing the construction and maintenance upon any part of the public domain of pipe lines, houses, fences or other structures, and authorizing the running or grazing of cattle or live stock upon said public domain, or for any other purpose. All deliveries of personal property to be accompanied by good and sufficient bills of sale conveying title thereto to said second party, and all real property of every description to be made by deeds or transfers as hereinbefore stated, and transfers are to be accompanied with abstracts of title showing the condition of the title to each particular parcel of land, and especially showing that a good and unencumbered title to all of the patented lands and mining claims is vested in the parties of the first part or one of them.

And said party of the second part hereby agrees to organize or cause to be organized on or before November 1st, 1907, under the laws of the Territory of

Arizona, a corporation to be known as and named the Grand Canyon Cattle Company, which shall be authorized and empowered, among other things, to acquire, own and hold all of the properties hereinbefore mentioned and to conduct and operate said ranches and engage in the cattle business; and said second party further agrees immediately upon the transfer, conveyance and delivery to him of all of the properties of said first parties, to be transferred, conveyed and delivered to said second party on or before November 1st, 1907, as herein provided, to sell, assign, transfer and set over to said corporation all of said properties, also this contract and every right, title, interest, claim and demand which said second party may be entitled to hereunder in consideration of the issuance to him of all of the shares of the capital stock of said corporation, excepting only one share for each *number* of the Board of Directors of said corporation and the assumption by said corporation of all promises, and obligations to be performed by said second party subsequent to the first day of November, 1907, as herein provided.

And said second party hereby agrees to make payment of the purchase price to said first parties in the manner as follows: [338]

1. The sum of fifteen thousand (\$15,000) dollars on the signing and delivery of this agreement.

2. The sum of one hundred thousand (\$100,000) dollars upon the transfer, conveyance and delivery on or before November 1st, 1907, by said first parties to the second party of all the property herein provided to be transferred, conveyed and delivered on or

before said last mentioned date in the manner herein provided for the transfer of said properties.

3. The balance of said purchase price calculated upon the basis of fifty thousand (\$50,000) dollars for all of said properties other than said live stock, and the sum of sixteen dollars per head for all live stock delivered on or before November 1st, 1907, is to be paid by and through the execution and delivery to said first parties by said Grand Canyon Cattle Company of two promissory notes of said company in equal amounts, payable in one and two years after their dates, with interest at the rate of six (6) per cent per annum, which two notes shall be secured by mortgage of said corporation upon real and personal property hereby agreed to be conveyed to said second party. The live stock to be covered by said mortgage shall be described therein as all of the cattle, horses and mules located upon said ranch properties or the grazing grounds connected therewith and bearing a straight bar Z (\overline{Z}) brand, and no statement of the number or estimated number of said cattle, horses or mules shall be inserted in said mortgage.

In the event the whole of said estimated lot of cattle is not delivered on or before November 1st, 1907, said first party shall have the right to make additional deliveries of said cattle from time to time thereafter up to and including the first day of November, 1908; all said deliveries to be made at said ranches and in such manner as to enable said second party to count and tally brand all cattle so delivered, and in ascertaining the number of said cattle the

calves born after November 1st, 1907, are not to be counted, but are to be considered for all purposes as the property of said second party, or said Grand Canyon Cattle Company. All cattle so delivered in any quarter of said year ending November 1st, 1908, are to be paid for by said second party or said Grand Canyon Cattle Company at the end of said quarter at the rate of sixteen dollars per head either in cash or by the execution and delivery to said first parties by said second party or said Grand Canyon Cattle Company of two of its promissory notes in equal amounts, payable at the same dates as [339] the two other notes hereinbefore provided for, and drawing interest at the rate of six per cent per annum.

Said second party or said Grand Canyon Cattle Company shall on or after November 1st, 1908, become the owner of all cattle remaining in said Bar Z brand, and all horses belonging to said ranches, whether said cattle or horses have been delivered on said first day of November, 1908, or not by said first parties and paid for by said second party as provided or not, and shall upon said last named date become the owner of and entitled to enjoy all of the rights and privileges appertaining to and connected with the ownership of said brand of said stock connected with said ranching business.

Said first parties hereby agree at their sole cost and expense to complete the pipe lines now in course of construction leading from the House Rock Springs, One Mile Spring and Two Mile Spring to House Rock House and corral, and also to complete at their sole cost and expense the large tank to be located at

or near Jacob's Pool House, and the contract for the construction of which has already been made and let, and to complete at their sole cost and expense all other works and improvements on said ranches now under way and in course of construction.

Said first parties and each of them further promise and agree that they will not at any time after November 1st, 1907, and so long as either said second party or said Grand Canyon Cattle Company shall engage in the business of buying and selling, raising or grazing cattle or live stock in said counties of Coconino or Mohave, or either of them, conduct or carry on, or directly or indirectly assist in establishing, conducting or carrying on any similar business in either of said counties, or any county of the state of Utah bordering upon the North boundary line of the Territory of Arizona and west of the Colorado River.

It is mutually understood that all expenses growing out of the management and conduct of said ranches from this date to the first day of November, 1907, are to be borne by said first parties, and that upon said last named date either said second party or said Grand Canyon Cattle Company is to assume possession [340] of said ranches and thereafter bear all expenses connected with the management and conduct thereof.

And said parties of the first part hereby agree immediately upon the signing of this agreement to deliver to said second party all deeds, permits, leases and other evidences of right and title of every name and description covering said lands, tenements and hereditaments for the purpose of enabling said sec-

ond party to prepare proper instruments of transfer and assignment.

It is understood that all of the horses hereinbefore referred to are branded in the letter S brand, and that said first parties must deliver all of said horses to said second party on or before November 1st, 1907.

It is understood that all of the saddle, work, pack and trail horses and mules hereinbefore referred to shall be delivered on or before the first day of November, 1907, and as many of the branded range horses as it is possible, through the exercise of reasonable diligence, to deliver on or before said date; that the balance of the branded range horses undelivered may be delivered at any time before the first day of November, 1908, and paid for as hereinbefore provided.

And it is further understood that upon the date last mentioned, to wit, November 1st, 1908, said second party or said Grand Canyon Cattle Company, shall become vested with and entitled to all of the rights and privileges appertaining to the ownership of said brand, which is the capital letter S.

It is mutually understood and agreed that this contract is to operate in all respects as though made, executed and delivered on the 30th day of June, 1907, and that this contract is intended to cover and include all livestock located upon or constituting a part of either of said ranch properties on the date last named, excepting only a certain lot of about 1,200 steers, two years old and up, rendezvoused on or about the date last mentioned on said Cane-Bed Ranch for spring sales, and also all personal property of every description located upon or appertain-

ing to either of said ranch properties on said 30th day of June, 1907.

All property covered by this agreement must be transferred, assigned and delivered by said first parties to said second parties free and clear of any and all incumbrances, including all liens and taxes for the current fiscal year levied upon or in any manner chargeable against said property or any part thereof. [341]

It is understood and agreed that each of the times and dates hereinbefore specified for the performance of any act in this agreement provided to be performed on the part of either said first parties or said second party or said Grand Canyon Cattle Company, is of the essence of this agreement.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written in this agreement.

HALEY & SAUNDERS. (Seal)

B. F. SAUNDERS. (Seal)

E. J. MARSHALL. (Seal)

In presence of:

FRANK PIERCE.

W. J. BARRETTE. [342]

**Defendant's Exhibit "C"—Agreement Dated
November 29, 1907.**

THIS MEMORANDUM, made the 29th day of November, nineteen hundred and seven, WITNESSETH:

That I, the undersigned, E. J. Marshall, for divers good and valuable considerations, including among

others the promise and undertaking on the part of the Grand Canyon Cattle Company, a corporation, to assume and fully perform each and every of my promises and undertakings contained in the certain contract of date July 30th, nineteen hundred and seven, and made by and between myself of the one part and Ora Haley and B. F. Saunders, copartners, doing business as Haley & Saunders, of the other part, and which said contract is hereto attached, which said promise and undertaking shall be implied from the acceptance of this assignment by said Grand Canyon Cattle Company, do hereby sell, assign, transfer and set over each and every right, title, interest, benefit or advantage secured to me in said contract or which I may be entitled to thereunder.

WITNESS MY HAND and seal the day and year first above written.

E. J. MARSHALL. [343]

**Defendant's Exhibit "D"—Abstract of Title to
Jacob Lode Mining Claim.**

**ABSTRACT OF TITLE TO JACOB LODGE MIN-
ING CLAIM.**

- To (1) Jacob Lode mining claim;
(2) Emmett Lode mining claim;
(3) Noonday Lode mining claim;
(4) Sunset Lode mining claim;
(5) Sunset Millsite;
(6) Kane Lode mining claim;
(7) Kane Millsite;
(8) Alaska Lode mining claim;
(9) Alaska Millsite;

- (10) Crane Lode mining claim;
- (11) Snipe Lode mining claim;
- (12) Frank Lode mining claim;

All situate, lying and being in the Warm Springs Mining District, in the County of Coconino, Territory of Arizona.

This abstract consists of copies of the following papers:

1. Location Notice Jacobs Lode mining claim, the same as set forth in Government's Exhibit 1.

2. Receiver's Receipt, Jacobs lode claim, dated November 3d, 1904.

3. Patent, United States to B. F. Saunders, Jacobs Lode mining claim, the same as set forth in Government's Exhibit No. 1.

4. Location Notice, Emmett Lode mining claim, the same as set forth in Government's Exhibit No. 11.

5. Receiver's Receipt Emmett Lode mining claim, dated March 23d, 1906.

6. Patent, United States to B. F. Saunders, Emmett Lode mining claim, the same as set forth in Government's Exhibit No. 11.

7. Location notice Noonday unpatented mining claim, located February 18th, 1904, by B. F. Saunders. Recorded March 1st, 1904, Book 5 of Mines, page 357, Records of Coconino County, Arizona. Locates 1500 feet in length by 600 feet in width of ground situated in North Fork or Dry Canyon, on Buckskin Mountains, about five miles southeast of Three Lakes and ten miles south of Jacobs Lake in Warm Springs mining district, Coconino County, Arizona.

8. Location Notice Noonday Lode, same as set forth in Government's Exhibit No. 10. [344]

9. Receiver's Receipt Noonday Lode, dated June 21st, 1908.

10. Patent, United States to B. F. Saunders, Noonday Lode, same as set forth in Government's Exhibit No. 10.

11. Location Notice Sunset Lode, same as set forth in Government's Exhibit No. 2.

12. Receiver's Receipt, Sunset Lode and millsite, dated December 21, 1905.

13. Patent, United States to B. F. Saunders, Sunset Lode and Millsite, same as set forth in Government's Exhibit No. 2.

14. Notice of Location of Kane Lode mining claim, located February 13th, 1904, by B. F. Saunders, Recorded March 1st, 1904, Book 5 of Mines, page 359, Records of Coconino County, Arizona. Locates 1500 feet in length by 600 feet in width on ground situated in Kane Canyon about one and one-half miles from its mouth in the Warm Springs mining district, Coconino County, Arizona.

15. Receiver's Receipt, Kane Lode and Kane Millsite, dated December 19th, 1905.

16. Location Notice Kane Millsite locates area of five acres in Kane Canyon about one mile from the mouth of said canyon in Warm Springs mining district, Coconino County, Arizona.

17. Location Notice of Alaska Lode mining claim, located February 17th, 1904, by B. F. Saunders, recorded March 1st, 1904, Book 5, of Mines, page 361, Records of Coconino County, Arizona. Locates 800

feet in length by 600 feet in width of ground situated on the Buckskin Mountain, about one mile south of Three Lakes, Warm Springs mining district, Coconino County, Arizona.

18. Location Notice of Alaska Millsite, located February 17th, 1904, by B. F. Saunders, recorded March 1st, 1904, Book 1 of Millsites and Water Rights, page 441, Records of Coconino County, Arizona. Locates not exceeding five acres situated on the Buckskin Mountains, about one mile west of Three Lakes in the Warm Springs mining district, Coconino County, Arizona.

19. Location Notice, Crane Lode mining claim, located February 18, 1904, by B. S. Saunders, Recorded March 1, 1904, Book 5 of Mines, page 356, Records of Mines, Coconino County, Arizona. Locates 1500 feet in length by 600 feet in width of ground situated in North Fork of dry canyon on the Buckskin Mountain, about fifteen miles south of Jacobs Lake in the Warm Springs mining district, Coconino County, Arizona. [345]

20. Location Notice Snipe lode mining claim, located February 17th, 1904, by B. F. Saunders, Recorded March 1, 1904, in Book 5 of Mines, Records of Coconino County, Arizona, page 358. Locates 1500 feet in length by 600 feet in width of ground situated on Buckskin Mountain in North Fork of Dry Canyon about five miles southwest from Three Lakes and ten miles from Jacobs Lake in the Warm Springs mining district, Coconino County, Arizona.

21. Location Notice of Frank Lode mining claim, Located February 18th, 1904, by B. F. Saunders,

Recorded March 1st, 1904, in Book 5 of Mines, page 355, Records of Coconino County, Arizona. Locates 1500 feet in length by 600 feet in width of ground situated on Buckskin Mountain in North Fork of Dry Canyon twelve miles southwest of Jacobs Lake in the Warm Springs mining district, Conconino County, Arizona. [346]

Defendant's Exhibit "E"—Agreement Dated July 30, 1907.

MEMORANDUM OF AGREEMENT Made by and between Ora Haley of Laramie, Wyoming, and B. F. Saunders of Salt Lake City, Utah, copartners as Haley & Saunders, parties of the first part, and E. J. Marshall and Grand Canyon Cattle Company, a corporation, under the laws of the State of California, of Los Angeles, California, parties of the second part, WITNESSETH:

THAT, WHEREAS, the said first parties and the said E. J. Marshall heretofore entered into a written contract dated July 30th, 1907, for the sale by said first parties and the purchase by the said second parties of certain real and personal property in said agreement set forth and described and upon certain terms and conditions therein set forth; and

WHEREAS, since said date, and prior to the making of this agreement, the said first parties and the said second parties (the said Grand Canyon Cattle Company being the assignee of the said E. J. Marshall) have modified and changed the terms of said agreement and heretofore have caused the same to be fully executed by the transfer, assignment and

delivery by said first parties and the conveyance of full title of and to all the property, real and personal, by said first parties to be sold, assigned and delivered, and by the payment and execution of obligation for payment by said second party of the full purchase price for the property so conveyed, assigned and transferred to it,

NOW, THEREFORE, it is agreed that the said contract of July 30th, 1907, hereinbefore referred to is hereby fully abrogated and discharged and the provisions thereof fully executed.

And it is hereby further agreed by said parties of the first part for and in consideration of the payment to them of the consideration in money now received, and in consideration of the obligations for payment by them received and they do hereby bind themselves and covenant that they will not at any time hereafter and so long as either of the said parties of the second part shall engage in the business of buying, selling, raising or grazing cattle or livestock in the Counties of Coconino and Mohave, or either of them, in the Territory [347] of Arizona, conduct or carry on or directly or indirectly assist in establishing, conducting or carrying on the business of buying, selling, raising or grazing cattle in either of said counties or in any county of the State of Utah bordering upon the north boundary line of the Territory of Arizona and west of the Colorado River.

IN WITNESS WHEREOF the parties hereto have set their hands and the said Grand Canyon

Cattle Company has caused its seal to be affixed the day and year above written.

GRAND CANYON CATTLE COMPANY.

By E. J. MARSHALL,
President.
ROBT. BULTMAN,
Secretary.

ORA HALEY.

B. F. SAUNDERS. [348]

United States of America,
District of Arizona,—ss.

I, William H. Sawtelle, United States District Judge, for the District of Arizona, and the Judge before whom the foregoing entitled cause was tried, do hereby certify that I have examined the foregoing statement of the evidence and find the same to be true, complete and properly prepared, and same is hereby approved. And I do certify that said statement contains all of the evidence offered or received at the trial of this cause, and shows all the proceedings had at the trial and contains all the documentary evidence, except formal and immaterial parts of certain exhibits, and except also certain exhibits consisting of maps, drawings and photographs, the originals of which, by stipulation of the parties are to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit.

WITNESS my hand this 27 day of November,
A. D. 1916.

WM. H. SAWTELLE,
United States District Judge. [349]

[Endorsements]: No. E-49-Phoenix. In the District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. B. F. Saunders et al., Defendants. Statement of Evidence. Service of the within admitted this 25th day of April, 1916. O'Melveny, Stevens & Millikin and Kibbey, Bennett & Curtis, Solicitors for Defendant, Grand Canyon Cattle Co. Lodged with the Clerk this 25th day of April, A. D. 1916, at Phoenix, Ariz. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Filed Nov. 27, 1916, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [350]

*In the District Court of the United States for the
District of Arizona.*

No. —.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS et al.,

Defendants.

Answer.

THE ANSWER OF THE GRAND CANYON CATTLE COMPANY, ONE OF THE DEFENDANTS, TO THE AMENDED BILL OF COMPLAINT OF THE UNITED STATES IN THE ABOVE-ENTITLED CAUSE.

This defendant, the Grand Canyon Cattle Company, now and at all times hereafter saving to itself all and all manner of benefit or advantage of excep-

tion or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said amended bill contained, for answer thereto, or for so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

I.

That it does not know and cannot set forth as its belief or otherwise, whether or not it is true as alleged in paragraph one of plaintiff's amended bill of complaint herein, that on and prior to the 24th day of October, 1901, the plaintiff was the owner in fee simple, as a part of its public domain, of the premises described in said paragraph, or whether or not the defendant B. F. Saunders located said land under the mining laws of the United States contained in Title 32, Chapter 6 of the Revised Statutes as amended, or whether or not on August 8th, 1904, the said B. F. Saunders filed in the plaintiff's local land office at Phoenix, Arizona, his application for a [351] patent for said tract, or whether or not the said B. F. Saunders alleged and represented in his said application that said premises contained gold and silver, and that he had made mining improvements thereon to the value of five hundred and fifty (\$550) dollars; or whether or not the said B. F. Saunders subsequently filed in plaintiff's said local land office his application to purchase said tract of land and paid the fees and purchase price required by law. But this defendant admits that thereafter on the 18th day of March, 1907, a United States patent was issued to said B. F. Saunders conveying to him

the legal title to the land described in said paragraph one.

II.

And this defendant, further answering said amended complaint, states that it does not know and has no sufficient information on which to found a belief or otherwise, whether or not it is true, as alleged in paragraph two of plaintiff's amended bill of complaint, that on and prior to the 27th day of June, 1905, the plaintiff was the owner in fee simple, as a part of its public domain, of the lands described in said paragraph two of said amended complaint, or whether or not on said date, or at all, the defendant B. F. Saunders located said last mentioned land under the mining laws of the United States and designated the same as "Emmett Lode" claim, or whether or not the said B. F. Saunders filed in plaintiff's local land office at Phoenix, Arizona, his application for a patent for said tract of land wherein he alleged and represented that the same contained gold, silver, copper, lead and other valuable minerals, and that he had made mining improvements thereon to the value of five hundred (\$500) dollars, or whether or not the said defendant B. F. Saunders thereafter made his application to plaintiff to purchase said land. But this defendant admits that on October 20th, 1906, a United States patent was issued by the plaintiff to the said B. F. [352] Saunders conveying to him the legal title to said land described in paragraph — of said amended complaint.

III.

Further answering said amended bill of complaint, this defendant alleges that it has no knowledge or information upon which to found a belief whether or not it is true as alleged in paragraph three of said amended bill of complaint that on and prior to the 27th day of June, 1905, the plaintiff was the owner in fee simple as a part of its public domain of the lands described in said paragraph, or whether or not on said date, or at all, the said B. F. Saunders located said land under the mining laws of the United States and designated the same as "Noonday" Lode claim, or whether or not on March 23d, 1906, or at all, said B. F. Saunders filed in plaintiff's local land office at Phoenix, Arizona, his application for a patent for said tract of land wherein he alleged and represented that the same contained gold, silver, copper, lead and other valuable minerals, and that he had made mining improvements thereon to the value of six hundred (\$600) dollars. But this defendant admits that on June 22d, 1907, a patent of the United States was issued to said B. F. Saunders conveying to him the title to the said land, described in said paragraph three of the amended bill of complaint herein.

IV.

Further answering said bill of complaint, this defendant states that it does not know and has no knowledge or information sufficient to found a belief, or otherwise whether or not it is true, as alleged in paragraph four of said amended bill of complaint, that on and prior to February 15th, 1904, the plain-

tiff was the owner in fee simple, as a part of its public domain, of the two certain tracts of land described in said paragraph four, or whether or not the said B. F. Saunders located the said tracts of land last mentioned under the mining [353] laws of the United States, designating one of said tracts as "Sunset Lode" claim and the other of said tracts as "Sunset Mill Site"; or whether or not on September 20th, 1905, or at all, the said B. F. Saunders filed in the local land office at Phoenix, Arizona, his application for patent for said tracts of land wherein he alleged and represented that the said "Sunset Lode" claim contained gold, silver, copper, lead and other valuable minerals, and that he had made mining improvements thereon to the value of eight hundred and fifty (\$850) dollars, or whether or not the said B. F. Saunders subsequently filed in said local land office his application to purchase said tracts of land, or whether or not the said B. F. Saunders filed an affidavit executed by himself and two witnesses procured by him, wherein it was alleged that the "Sunset Millsite" was used and occupied by said B. F. Saunders for mining purposes, to wit, the storage of ore from the "Sunset Lode" claim for milling purposes. But this defendant admits that on the 6th day of June, 1906, a United States patent was issued to the said B. F. Saunders conveying to him the legal title to the two said tracts of land described in paragraph four of said amended bill of complaint.

V.

Further answering plaintiff's amended bill of

complaint herein, this defendant specifically denies that any representations made by the said defendant B. F. Saunders to the plaintiff or any of its officers for the purposes of securing title to any of the premises described in the plaintiff's said amended bill of complaint, if such representations were so made by said B. F. Saunders, were false or fraudulent or untrue or were made by the said B. F. Saunders for the purpose of deceiving the officials of the plaintiff's land department without belief on the part of the said B. F. Saunders that the said statements and representations were true. And this defendant denies that [354] the lands so alleged to have been located and entered as lode claims were not mineral lands and did not and do not bear gold, silver, copper, lead or other valuable minerals, and denies that at the time of the filing of said applications to purchase the same and for a patent therefor, no gold, silver, copper, lead or other valuable mineral had been discovered on said lands, and denies that said lands, if so located, applied for and entered as lode claims by said B. F. Saunders, were not located and entered by said B. F. Saunders for mining purposes or because of minerals therein, and denies that the said "Sunset Mill Site" was not occupied and used by the said B. F. Saunders for mining purposes for the storage of ore from the said "Sunset Lode" claim and other claims, and denies that said lands or any of them designated in said amended bill of complaint as lode claims and the tract therein described as a mill site were located, applied for and entered by said B. F. Saunders for the purpose of

obtaining exclusive possession, enjoyment and control of springs of water existing thereon, and denies that the said B. F. Saunders had not expended the respective sums alleged in said amended bill of complaint to have been expended by him in making improvements on said lands, and denies that no mining

improvements had been made upon said

*This insertion made by leave of Court on Jan. 11, 1915. George W. Lewis, Clerk.

land by said B. F. Saunders for mining purposes. *And denies that no mining im-

provements had been made on said lands

or any of them by said B. F. Saunders or

anyone on his behalf were made for the pur-

pose of developing the said water supply

and not for mineral or mining purposes.*

VI.

Further answering the plaintiff's amended complaint, this defendant says: That it admits that on, to wit, the second day of December, 1907, the said B. F. Saunders executed a deed conveying the title to the lands described in said plaintiff's amended bill of complaint as "Jacob Lode Claim" and "Emmett Lode Claim," to this defendant, the Grand Canyon Cattle Company, and admits that on, to wit, the 5th day of December, 1907, the said B. F. Saunders executed a deed conveying the title to the land described in said amended bill of complaint as the "Noonday [355] Lode Claim," the "Sunset Lode Claim" and the "Sunset Mill Site" to this defendant, the Grand Canyon Cattle Company. But this defendant specifically denies that at the time of the execution of said deeds and prior to any contract or agreement to purchase said lands or any part

thereof from said B. F. Saunders, or at any time or in any manner whatever, it was notified and informed of the said illegal methods and proceedings or any illegal methods and proceedings by means of which the said B. F. Saunders had acquired plaintiff's patents for said lands, and denies that at said times or at any time this defendant knew of any false or fraudulent methods and proceedings were or had been adopted or practiced by the said B. F. Saunders for the purpose of acquiring the title to said lands from said plaintiff, but alleges the facts to be that it purchased the premises described in the plaintiff's bill of complaint from the defendant, B. F. Saunders for a valuable consideration, in good faith, without any knowledge or notice whatever of any fraudulent, irregular or improper means by which the title to said premises had been obtained by said B. F. Saunders, if any such improper, irregular or fraudulent means for said purpose had been employed by said B. F. Saunders; that it took the title to said premises from said B. F. Saunders relying upon the record title thereto as exhibited and shown to it by the record of the patents from the plaintiff, the United States, to the said B. F. Saunders, and not otherwise.

And this defendant, further answering, denies that the plaintiff was misled and deceived by any false, fraudulent and untrue representations and statements made to it by said B. F. Saunders, and that it was thereby induced to allow the said B. F. Saunders to make entry of said premises and to cause the patents above described to be issued thereon. [356]

VII.

And this defendant denies that it took the title to said premises from the said B. F. Saunders with any fraudulent purpose or intention whatever, without this, that there is any other matter, cause or thing in said plaintiff's said amended bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

O'MELVENY, STEVENS & MILLIGAN,
KIBBEY, BENNETT & BENNETT,
Attorneys and Solicitors for the Defendant the
Grand Canyon Cattle Co. [357]

[Endorsements]: No. 49. In the District Court of the United States for the District of Arizona. The United States of America, Plaintiff, vs. B. F. Saunders et al., Defendants. Answer of the Defendant Grand Canyon Cattle Company. Service of a copy of the within Answer is hereby acknowledged this 9th day of January, 1913. O. T. Richey, Asst. U. S. Atty., Atty. for Plaintiff. O'Mulveny, Stevens & Millikin, Kibbey, Bennett & Bennett, Attorneys and Counselors for Grand Canyon Cattle Company. Filed Jan. 9, 1913, at — M. Allan B.

Jaynes, Clerk. By Frank E. McCreary, Deputy.
[358]

*In the District Court of the United States, for the
District of Arizona.*

No. 49—IN EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

B. F. SAUNDERS et al.,
Defendants.

Replication.

REPLICATION OF THE PLAINTIFF TO THE
ANSWER OF THE DEFENDANT, GRAND
CANYON CATTLE COMPANY, IN THE
FOREGOING ENTITLED CAUSE.

And now comes The United States of America, by the Attorney General, and replying to the answer filed in the above cause, says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say that its bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendant is untrue and insufficient.

WHEREFORE, plaintiff prays relief as set forth in its amended bill.

GEO. W. WICKERSHAM,
Attorney General of the United States.

J. E. MORRISON,
United States Attorney for the District of Arizona.

[Endorsements]: #49. District Court United States District of Arizona. United States vs. B. F.

Saunders et al. Replication. Copy of within received this January 14th, 1913. Kibbey, Bennett & Bennett, Solicitors for Defendant Grand Canyon Cattle Company. Filed January 14, 1913, at 2 P. M. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy. [359]

*In the United States District Court for the District
of Arizona.*

IN EQUITY—No. E-49 (PHOENIX).

THE UNITED STATES OF AMERICA,

Complainant,

vs.

B. F. SAUNDERS and THE GRAND CANYON
CATTLE COMPANY,

Respondents.

Memorandum Opinion.

Hon. JAMES M. SHERIDAN, Special Assistant to
the Attorney General, Los Angeles, California;

Hon. THOMAS A. FLYNN, United States Attorney
for the District of Arizona, Phoenix, Arizona; and

Hon. SAMUEL L. PATTEE, Assistant United
States Attorney for the District of Arizona,
Tucson, Arizona;

Solicitors for Complainant.

Messrs. O'MULVENY, STEVENS & MILLIKIN,
Los Angeles, California; and

Messrs. KIBBEY, BENNETT & BENNETT,
Phoenix, Arizona;

Solicitors for Respondents.

This is a suit in equity brought by the Government

against B. F. Saunders and The Grand Canyon Cattle Company to cancel patents issued to said Saunders for three certain alleged mineral claims and one mill site, situated in Kaibab National Forest, in Coconino County, Arizona, and by said Saunders conveyed to said Grand Canyon Cattle Company.

The bill alleges the location by Saunders, under the mining laws of the United States of said lode claims and mill site, the filing in the local land office of his application for a patent therefor, wherein he alleged and represented that the said respective tracts of land located as lode claims contained gold and silver and other valuable minerals, and that said mill site was by him used and occupied for mining purposes, to wit, the storing of ore from one of said lode claims for milling purposes, and the issuance to said Saunders of patents conveying to him the legal title to said several tracts of land. [360]

The bill further alleges "that the representations so made by the said B. F. Saunders were and are wholly false, fraudulent and untrue, and were made by the said B. F. Saunders for the purpose of deceiving the officials of the plaintiff's (complainant's) land department without any belief on the part of the said B. F. Saunders that the said statements and representations, or any of them, were true; that in truth and in fact the said lands located and entered as lode claims were not and are not mineral lands, and did not and do not bear gold, silver, copper, lead, or any other valuable mineral; that at the time of the filing of the said applications to purchase, no gold, silver, copper, lead or other valuable

mineral had been discovered on said lands, or any of them, nor has any been discovered since; that the said lands so located, and applied for and entered as lode claims were not so located, applied for and entered by the said B. F. Saunders for mining purposes or because of any minerals therein, and the said Sunset Mill site was not occupied and used by the said B. F. Saunders for mining purposes, for the storage of ore from the said Sunset lode claim, or any other claim, but all of said lands, those designated as lode claims, as well as the tract designated as a mill site, were so located, applied for and entered for the sole purpose of obtaining the exclusive possession, enjoyment and control of valuable springs of water existing thereon, and the said B. F. Saunders has not expended the respective sums alleged to have been expended by him, or any sum of money, in making mining improvements on said lands, and had made no mining improvements whatever on the same, the [361] only improvements made on said lands or any of them by the said B. F. Saunders, or any one in his behalf, were made for the purpose of developing the said water supply and not for mineral or mining purposes"; that complainant was misled and deceived by the false and fraudulent statements so made by Saunders, and because of such deceptions, was induced to allow said entries, and to cause the said patents to be issued thereon; that subsequently Saunders executed deeds conveying the legal title to the several tracts of land to said Grand Canyon Cattle Company, and that said company, "at the time of the execution of said

deed, and prior to any contract or agreement to purchase said lands or any part thereof from said Saunders, was fully notified and informed of said illegal methods and proceedings by means of which said Saunders had acquired complainant's patents to said lands."

Saunders, one of the respondents, died several years prior to the date of the filing of the suit. The Grand Canyon Cattle Company answered disclaiming all knowledge of the alleged fraud on the part of Saunders, and setting up that it was a *bona fide* purchaser without notice for value, after the issuance by the Government to Saunders of the said patents.

Two questions only are here presented:

First, was the title to the property in question fraudulently obtained by Saunders from the Government?

Second, was the Grand Canyon Cattle Company a *bona fide* purchaser thereof for value?

With regard to the first question, I have no difficulty in holding that the respondent Saunders was guilty [362] of at least legal fraud, and if this were an action solely between the Government and Saunders a decree would be entered in behalf of the former.

With regard to the allegations of the bill of complaint respecting knowledge or notice by the Grand Canyon Cattle Company of the illegal methods and proceedings of Saunders by means of which he acquired or obtained patents to said property, I am of the opinion that there is an utter failure to estab-

lish such allegations, and I find that said Grand Canyon Cattle Company at no time prior to the date of the delivery of the deed and the payment of the consideration, which was *bona fide*, had any actual knowledge or notice of the alleged fraud or illegal methods of Saunders, or of facts sufficient to put it on inquiry, and that the defense of a *bona fide* purchaser for value without notice has been fully met and proved.

The governing principles in cases of this character, as repeatedly set forth in the decisions of the Supreme Court of the United States, are so well established that it would seem unnecessary to restate them here. These principles are clearly enunciated in the following cases:

Diamond Coal Company v. United States, 233 U. S. 236;

Maxwell Land Grant Case, 121 U. S. 325, 379-381;

United States vs. Iron Silver Mining Company, 128 U. S. 673, 676;

United States vs. Stinson, 197 U. S. 200, 204-205;

Colorado Coal Company v. United States, 123 U. S. 307, 313;

United States v. Detroit Lumber Company, 200 U. S. 321;

United States v. Clark, 200 U. S. 601, 608.

A decree will be entered in accordance with this memorandum opinion.

WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona. [363]

[Endorsements]: No. E-49—(Phoenix). In the United States District Court for the District of Arizona. The United States of America, Complainant, vs. B. F. Saunders and The Grand Canyon Cattle Company, Respondents. In Equity. Memorandum Opinion. Filed Apr. 28, 1915. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [364]

*In the District Court of the United States, for the
District of Arizona.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Decree.

This cause came on to be heard at the October, 1914, term of this court. Evidence was introduced on behalf of both plaintiff and defendant, Grand Canyon Cattle Company.

After hearing the arguments of counsel for plaintiff and defendant, the Court took the matter under advisement.

And now at this April, 1915, term of this court, the Court having considered the evidence and being fully advised in the premises, it is Ordered, Adjudged and Decreed, that the plaintiff's bill of com-

plaint herein, be and hereby is dismissed upon the merits.

Dated this 28th day of April, 1915.

WM. H. SAWTELLE,

Judge.

[Endorsements]: No. 49. In the District Court of the United States for the District of Arizona. The United States of America, Plaintiff, vs. B. F. Saunders, Grand Canyon Cattle Company, a Corporation, and Ora Haley, Defendants. Decree. Filed Apr. 28, 1915. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. [365]

*In the District Court of the United States, for the
District of Arizona.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Notice of Entry of Decree.

To the Above-named Plaintiff and Its Attorneys and
Each of Them:

You are hereby notified that the Court has made and caused to be entered its decree in the above-entitled cause, in favor of the defendant Grand Canyon Cattle Company and against the plaintiff and dismissing the bill of complaint therein.

Dated May 3, 1915.

O'MELVENY, STEVENS & MILLIKIN,
KIBBEY, BENNETT & BENNETT,
Attorneys for Defendant Grand Canyon Cattle
Company. [366]

[Endorsed]: No. 49—In Equity. In the District Court of the United States, for the District of Arizona. The United States of America, Plaintiff, vs. B. F. Saunders, Grand Canyon Cattle Company, a Corporation, and Ora Haley, Defendants. Notice. Received copy of the within notice, this 6th day of May, 1915. Thomas A. Flynn, Attorney for Plaintiff. Filed May 7, 1915 at — M. George W. Lewis, Clerk. By. R. . L. Webb, Deputy. [367]

COPY.

*In the District Court of the United States for the
District of Arizona.*

No. E-49—PHOENIX.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Petition for Appeal.

Comes now The United States of America, plaintiff in the above-entitled cause, by Thomas A. Flynn,

United States Attorney for the District of Arizona, and respectfully shows:

That on the 28th day of April, 1915, the final decree of this Court in this cause was rendered and entered, wherein and whereby it was ordered, adjudged and decreed that the said plaintiff's bill of complaint be dismissed on the merits.

That neither B. F. Saunders nor Ora Haley, named as defendants in said bill of complaint, were ever served with process or appears in this cause in any manner whatever, and neither of said last-named persons is affected by nor interested in sustaining said decree, and that said B. F. Saunders died long prior to the commencement of this suit.

That the said United States of America, conceiving itself aggrieved by the said final decree, appeals from the final decree of this court in this cause, rendered and entered on the 28th day of April, 1915, to the United States Circuit Court of Appeals for the Ninth [368] Circuit, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

THOMAS A. FLYNN,

United States Attorney for the District of Arizona,
Solicitor for Plaintiff.

Order Allowing Appeal.

And now, to wit, on October 26th, 1915, it is ordered that the appeal be allowed as prayed in the foregoing petition.

WM. H. SAWTELLE,

United States District Judge, District of Arizona.

[Endorsements]: No. E-49—Phoenix. In the District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. B. F. Saunders, Grand Canyon Cattle Company, a Corporation, and Ora Haley, Defendants. Petition for Appeal and Order Allowing Appeal. Filed Oct. 26, 1915. George W. Lewis, Clerk. [369]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THE UNITED STATES OF AMERICA,

Appellant,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY, Defendants, GRAND CANYON
CATTLE COMPANY, a Corporation,

Appellee.

Assignment of Errors.

Comes now The United States of America, by Thomas A. Flynn, United States Attorney for the District of Arizona, and says that in the record and proceedings in this cause in the District Court of the United States for the District of Arizona, as well also in the decree rendered and entered in said District Court on the 28th day of April, 1915, there is manifest error, to the great prejudice of the United States of America, in this, to wit:

1. The District Court of the United States for the District of Arizona erred in sustaining the objection of the defendant Grand Canyon Cattle Com-

pany to the following question asked the witness Howard B. Young, in his deposition, viz.: "So, now, Mr. Young, as I understand you, at the time this mining work was being done on the Jacobs lode by yourself and David Rider under the direction of Mr. Neill, you were receiving \$35 per month as a hand on that ranch and so was David Rider?" and in excluding the answer of the witness to said question, "Yes, sir."

2. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Howard B. Young, in his deposition, to wit: "Did he say to you at the time this open cut was being [370] done on the Jacobs Lode that it was for mining assessment?" and in excluding the answer of the witness to said question: "Well, I don't remember now just what he said. That was the understanding I got."

3. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Howard B. Young, in his deposition, viz.: "And that the purpose of it was, as you have testified, to hold the property for stock watering purposes?" and in excluding the answer of the witness to said question, viz.: "Yes, sir."

4. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Howard B. Young, in his deposition, viz.: "What did Mr. Dimmick say to you, if anything,

when he brought this affidavit to you to sign?" and in excluding the answer of the witness to said question, viz.: "He asked me if I would sign an affidavit that I had done work on that claim, and I told him yes."

5. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following asked the witness Howard B. Young, in his deposition, viz.: "Did you, at the time you signed the affidavit, know what the purpose of it was?" and in excluding the answer of the witness to said question, viz.: "Well, the purpose was to hold these claims as watering places."

6. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Howard B. Young, in his deposition, viz.: "Now, it says in this affidavit, Mr. Young, that the labor and improvements made on the Sunset lode and Sunset millsite by the applicant, and by his grantors, exceeds \$500 in value. Did you at the time you signed this affidavit, or at any time, know that [371] \$500 worth of work had been done by anybody on the Sunset lode and Sunset millsite?" and in excluding the answer of said witness to said question, viz.: "No, sir."

7. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Howard B. Young, in his deposition, viz.: "Now, was there any conversation at the time you signed this final oath for surveys between you and Dim-

mick concerning the purpose of this affidavit?" and in excluding the answer of the witness to said question, viz.: "No, sir."

8. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Howard B. Young, in his deposition, viz.: "You do not remember whether you did or not?" and in excluding the answer to said question, viz.: "No, sir. He made a brief statement of what the affidavits were and wanted to know if I would sign them. I told him yes. I don't remember reading the affidavits over."

9. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Hinton Siler, in his deposition, viz.: "What pay did you receive for this work?" and in excluding the answer of the witness to said question, viz.: "Thirty-five dollars a month."

10. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Hinton Siler, in his deposition, viz.: "During the time that you were doing this water development work, at all these different points concerning which you have testified, under Mr. Crosbie's immediate direction, and under the final direction of Mr. Dimmick, in every instance, did you have any conversation [372] with Mr. Dimmick at any time about the purpose of this work?" and in excluding the answer of the witness to said question, viz.: "Noth-

ing, only that he was doing it to let the water into the tunnels so that he could pipe it out. He so stated the case to me."

11. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness John T. Little, in his deposition, to wit: "Did you know of it being a watering place before the Saunders people got hold of it?" and in excluding the answer of the witness to said question, viz.: "Yes."

12. The said District Court erred in sustaining the objection asked the witness W. L. Walker, in his deposition, viz.: "In observing these cabins, and from such present recollection that you have of them, what did they appear to be, or to have been, used for?" and in excluding the answer of the witness to said question, viz.: "They had been used for residences for those working at the sawmill, or for cowboys during such times as they quartered themselves over night at the sawmill."

13. The said District Court erred in granting the motion of the defendant Grand Canyon Cattle Company to strike out the answer of the witness W. L. Walker to the following question, "How do you account for the presence of this copper-stained rock that you saw near the cut?" which answer so stricken out reads as follows: "After a very careful examination of the rock in place in the cut, and knowing the presence of copper-bearing rock at a point a half a mile or more to the west of Jacobs lake, the conclusion that arose in my mind was that very probably this copper-stained float which I noticed at the cut

had been by some means or other probably dropped at this point, having had its origin in known mineral exposure that I have mentioned a half mile west of [373] the Jacobs lode. This was also based on the fact that on the road running through Jacobs lode at another point I observed a small piece of similar copper-stained rock—a piece of float right on the surface of the road, which gave indications of having been dropped there by man or from a wagon or some other method of conveyance, from its original site in a mineral deposit a half mile or more west of the Jacobs lode,” and in excluding said answer from the evidence.

14. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness W. L. Walker, in his deposition, viz.: “Then please give us a little more information, if you can, as to what was the apparent true purpose of this excavation?” and in excluding the answer of the witness to said question, viz.: “This shaft stands in the basin portion of the lode very close to the edge of the lake. The only useful purpose that it appeared to have served was the possible one of use for well purposes. That is, standing close to the edge of the lake, the lake waters percolating into this excavation, might serve as better water for culinary purposes than the water of the lake which was used for the stock. However, so far as appearances showed the excavation might have been dug simply as an attempt to perform assessment work on the mining claim.”

15. The said District Court erred in sustaining the

objection of the defendant Grand Canyon Cattle Company to the following question asked the witness W. L. Walker, in his deposition, viz.: "Have you with you any records from which you could give us the results of the assays? Now, I direct my question to rock in place on the claims under consideration?" and in excluding the answer of the witness to said question, viz.: "Yes, I have an assay certificate showing the results of three samples taken from the Jacobs lode." [374]

16. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the assay certificate, Government's Exhibit No. 22, set forth in the evidence in this cause, and in excluding said certificate from the evidence.

17. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Joseph Jensen, in his deposition, viz.: "Did it have the appearance of having been abandoned?" and in excluding the answer of the witness to said question, viz.: "It appeared not to have been used for a long time and it was not in a state of repair suitable for use."

18. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Edgar L. Clarke, in his deposition, viz.: "Now, directing your attention especially to this Bessie Horn mining claim, what was it that caused Mr. Saunders to have a mining claim made on that piece of ground?" and in excluding the answer of the witness

to said question, viz.: "To secure a watering place for livestock."

19. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Edgar L. Clarke, in his deposition, viz.: "And was it Mr. Saunders' purpose in locating these claims to secure water for stock watering purposes?" and in excluding the answer of the witness, as follows: "Of course that refers to the ones I assisted in locating?" Q. "Surely." A. "Yes, sir."

20. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Edgar L. Clarke, in his deposition, viz.: "Well, then, for the purpose of making matters clearer, I will frame [375] the question in a different way. Is it true that all of the claims concerning which you now have a distinct recollection of having assisted in locating, were located by Mr. Saunders for the purpose of securing watering places for the stock of Saunders and Haley on the Buckskin Mountain ranch?" and in excluding the answer of the witness to said question, viz.: "Yes, sir."

21. The said District Court erred in excluding all evidence relating to the cost or value of the work done on the four patented claims involved in this suit, and in ruling that evidence respecting such cost or value was not admissible.

22. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness

John T. Breckon, in his deposition, viz.: "Now, will you give us in your own way just how it was that you computed the value of the development work done on this claim?" and in excluding the answer of the witness to said question, viz.: "The open cut was the one mentioned before at the discovery, and was estimated in the usual way. A tunnel in hard rock is estimated from \$10 to \$12 per foot; an open cut is estimated according to the depth of it; and the shaft that was partly covered with water—partly filled with water from the lake.

23. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness John T. Breckon, in his deposition, viz.: "What did you have to guide you as to the expense of making that open cut?" and in excluding the answer of the witness to said question, and in excluding the testimony given by said witness as to the manner of estimating the value of and cost of making the open cut referred to in the question. [376]

24. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness John T. Breckon, in his deposition, viz.: "Of course I realize, Mr. Breckon, it was a fairly good time ago and these details may be indistinct now; but from your testimony I gather that you observed that the tunnels, as far as you observed at that time, had been used for the development of water. That is correct?" and in excluding the answer of the witness to said question, viz.: "They were using it, taking water out."

25. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness John T. Breckon, in his deposition, viz.: "Now, give us the manner in which you computed the amounts of money expended in development work on the Sunset lode, Mr. Breckon?" and in excluding the answer of the witness to said question, viz.: "That was the same as we usually make these estimates—see the character of the rock, the size of the tunnel, and the earth removed," and in excluding the further testimony of the witness as to the manner of estimating the cost of the work referred to and the amount at which such work was estimated.

26. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness John T. Breckon, in his deposition, viz.: "You considered solely the amount of the area excavated—the amount of ground excavated, and the dimensions of the claims?" and in excluding the answer of the witness to said question, viz.: "I measured the *the* tunnel. I supposed he had run the tunnel in search for mineral and developing the ground for mineral."

27. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following [377] question asked the witness John T. Breckon, in his deposition, viz.: "Now, will you please tell us the manner in which you computed the amount expended for improvements on the Noonday lode?" and in excluding the answer of the witness to said question, viz.: "In the

usual way by getting the dimensions of the tunnel and seeing the character of the rock and thus making the estimates of the cost," and in excluding the further testimony of the witness as to the manner of estimating the cost and value of the improvements mentioned and the amount of such estimates.

28. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness John T. Breckon, in his deposition, viz.: "Now, in making your return as to improvements on this Emmett lode—from that return as shown in Government's Exhibit No. 11,—were you guided in arriving at your estimate of the amount expended by anything that might have been said to you by Mr. Saunders or Mr. Dimmick?" and in excluding the answer of the witness to said question, viz.: "No, sir, Mr. Dimmick claimed at that time that they had spent at least \$500 on that tunnel. I told him I could not return it. I think it was 50 feet. That would be \$10 a foot. I told him they would have to do more work."

29. The said District Court erred in excluding the further testimony of the witness Breckon as to the manner of computing the cost of the work on the Emmett lode, and the amounts of the cost so computed.

30. The said District Court erred in sustaining the objections of the defendant Grand Canyon Cattle Company to the following questions asked the witness, John T. Breckon in his deposition, and in excluding the following answers of the witness, viz.:

“Q. What further examination did you make in order to ascertain whether the requisite amount of work had been done on the claim? [378]

A. I don't remember that I made a personal examination. Q. Did they report to you in some manner?

A. It was reported to me by Mr. Saunders that he had caused 25 feet, I think, of additional work to be done. Q. And on his additional report to you, you reported it? A. Yes, sir. It is an expensive trip to go there from Salt Lake City and back.”

31. The said District Court erred in sustaining the objection to the affidavit of John T. Breckon, Government's Exhibit No. 12, set forth in the transcript of the evidence, and in excluding said affidavit from the evidence.

32. The said District Court erred in sustaining the objection of the Grand Canyon Cattle Company to the assay certificate, exhibit “A” attached to the deposition of W. A. Black, and set forth in the transcript of the evidence in this cause, and in excluding said assay certificate from the evidence.

33. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the introduction in evidence of the assay certificate exhibit “B” attached to the deposition of W. A. Black, and set forth in the transcript of the evidence in this cause, and in excluding said assay certificate from the evidence.

34. The said District Court erred in sustaining the objection of the Grand Cattle Canyon Company to the following question asked the witness A. F. Rynders, in his deposition, and in excluding the an-

swer of said witness, viz.: "Q. Prior to the destruction of these papers had you or had you not heard that suit had been brought by the Government involving the title to certain lands which had theretofore been acquired by the partnership and transferred to the Grand Canyon Cattle Company? A. I had heard indirectly, from the newspapers." [379]

35. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the introduction of the letter exhibit "C," attached to the deposition of A. F. Rhynthers, and in excluding said letter from the evidence, said letter being as follows:

"United States Department of Agriculture.
Forest Service.

Fredonia, Ariz., Dec. 3, 1906.

B. F. Saunders,

Salt Lake City, Utah:

Dear Sir:—

I write to inform you that your claims, in Kane Canyon, were inspected, by the Forest Inspector, W. W. Clark, & myself, during the forepart of November, and reported to the Department, as requested.

Forest officers are now required to send a sample of 15 or 20 lbs. of ore to be tested, for the information of the Forester, and as there was no samples of ore to be found on the Claim, it is impossible to tell just what action will be taken by the department.

I have mailed to the Forester the assay which you sent me, taken from the Kane lode.

Very respectfully,
LORRINE PRATT,
Forest Supervisor."

36. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following questions asked the witness Charles Dimmick, in his deposition, and in excluding the answers of the witness thereto, viz.: "Q. And as superintendent you were authorized to purchase supplies? A. Yes, sir. Q. And you did do so? A. Yes, sir."

37. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness David Barney, in his deposition, viz.: "You saw them writing down something at these points?" and in excluding the answer of the witness to said question, viz.: "Yes."

38. The said District Court erred in sustaining the objections of the defendant Grand Canyon Cattle Company to the following questions asked the witness David Barney in his deposition, and in [380] excluding the following answers of the witness, viz.: "Q. Did you learn anything from the members of the party about whether or not Mr. Saunders retained any interest after the sale to Marshall and Stephenson? A. Yes, I understood they left him an interest. Q. Do you know what interest? A. No, I forget what interest. They told me. Q. Who told you? A. Marshall. Q. Can you recall approximately

what interest Mr. Saunders retained after the deal was made? A. No. Q. But you did learn from Mr. Marshall that Mr. Saunders did retain an interest after the sale to Marshall and Stephenson? A. Yes. The way I understood it they wanted him in and gave him an interest in the business or something. Q. And that information you obtained from Mr. Marshall himself while there with the party? A. Yes."

39. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked of the witness Selden F. Harris, "Q. What was the conversation?" (referring to conversation between the witness and one H. S. Stephenson).

40. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Selden F. Harris, viz.: "Q. State what that conversation in substance was as nearly as you can recall?" and in not permitting the witness to answer said question, except for the purpose of taking such answer under equity rule 46.

41. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following testimony given by the witness Selden F. Harris and in excluding the following testimony given by said witness, viz.:

"During the conversation with Mr. Stephenson upon the branding [381] *branding* chute in the corral, at the V. T. Park, I was frank to inform Mr. Stephenson that certain claims known as the Kane

lode, Kane mill site and the Jacobs lode were being held by the Government as being invalid, and that it was very doubtful in my opinion if patent on the same would ever be issued because reports of all Forest Supervisors showed these claims to have been located to obtain water and not for mining purposes. And further than that, that these claims were not upon mineral-bearing rock in place. I think that was, as near as I can recall, the substance of the conversation at that time"; and the said District Court erred in not considering said testimony as a part of the evidence in the cause.

42. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Selden F. Harris, viz.: "Did Mr. Stephenson make any comment after you so informed him?" and in excluding the answer of the witness to said question, viz.: "There was no particular comment made, no, sir."

43. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness Selden F. Harris, viz.: "Q. Did he do anything after you gave him this information?" and in excluding the answer of the witness to said question, viz.: "A. He proceeded along the regular routine of work that was being done with not very much to say. I think that it was just about that time that some cattle were let out. Later we resumed our conversation in a more general way, and the conversation was soon changed, there having been a heavy storm coming up

from the west, which made a very pretty picture, and he switched off on the conversation about the kodak. He said 'that would make a pretty picture, Harris,' and I took a picture at that time."

44. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question [382] asked the witness Selden F. Harris, viz.: "Q. You say you returned to your original conversation. Who returned to that original conversation first after you gave this information to Mr. Stephenson?" and in excluding the answer of the witness to said question, viz.: "A. I did."

45. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following question asked the witness E. J. Marshall, on cross-examination, as follows:

"Q. Is it true that Mr. Stephenson, in all of these negotiations with Mr. Saunders, was representing you as your manager?" and in excluding the answer of the witness to said question, viz.: "A. He was not."

46. The said District Court erred in sustaining the objection of the defendant Grand Canyon Cattle Company to the following testimony given by the witness E. J. Marshall, under Equity Rule 46, and in excluding said testimony and in not considering the same as a part of the evidence in this cause, said testimony being as follows:

"Mr. Stephenson was acting for me in inspecting a bunch of cattle that I contemplated buying. I refer to the inspection of the cattle on the V. T. Ranch,

in June, 1907, and September, 1907. We took over no cattle from Saunders in October, 1907. Mr. Stephenson appeared as my representative or the representative of the Grand Canyon Cattle Company in October, 1907, for the purpose of counting the cattle for the Grand Canyon Cattle Company. He had authority to count the cattle, to tally-brand them, and report to me the number tally branded. Mr. Stephenson has been my manager for eleven years in California. On the occasion of these two trips in 1907, in my company to the Buckskin Mountain ranch, and on the occasion when Mr. Stephenson appeared at the Buckskin ranch [383] to count cattle in 1907, he had no authority as representative of the Grand Canyon Cattle Company because it was not then organized, but he was representing me in other companies and I requested him to go and look at these cattle and pass upon their quality and the quality of the range and the condition of the water and advise me. On these occasions during the entire year 1907 he was in my employ as my cattle manager."

47. The said District Court erred in dismissing the bill of complaint and in rendering its decree dismissing said bill of complaint, for the reason that it was established by the evidence that B. F. Saunders was guilty of the fraud charged in said bill of complaint, and that the defendant Grand Canyon Cattle Company had notice or knowledge of such fraud, or had notice or knowledge of facts sufficient to put it on inquiry with respect to such fraud of said Saunders.

48. The said District Court erred in not finding

from the evidence and in not holding and deciding that the defendant Grand Canyon Cattle Company had notice or knowledge of the fraud committed by said B. F. Saunders and charged in the amended bill of complaint or knowledge of facts sufficient to put it on inquiry with respect to such fraud, at the time of the conveyance of the property described in said amended bill of complaint by said Saunders to said Grand Canyon Cattle Company.

49. The said District Court erred in finding and deciding that the defendant Grand Canyon Cattle Company purchased the property described in said amended bill of complaint and involved in this suit from said B. F. Saunders in good faith, for value, and without notice or knowledge of any fraud on the part of said Saunders, for the reason that the evidence shows that said Grand Canyon Cattle Company, at the time of such purchase, had notice and knowledge of the fraud of said Saunders, and purchased said property with such notice. [384]

50. The said District Court erred in its said decree dismissing the plaintiff's bill of complaint for the reason that the evidence shows that Saunders was guilty of the fraud charged in the amended bill of complaint and the defendant Grand Canyon *Cattle failed* to prove that at the time it purchased the property involved in this suit from said Saunders, it purchased the same in good faith, for a valuable consideration, and without notice or knowledge of the said fraud of said Saunders.

51. The said District Court erred in not rendering its decree in favor of the United States of Amer-

ica as prayed in the amended bill of complaint, annulling and cancelling the patents issued by the United States to said B. F. Saunders, and the deed or deeds conveying the said property described in said amended bill to the defendant Grand Canyon Cattle Company, and for all the relief prayed in said amended bill of complaint, for the reason that it was shown by the evidence that said Saunders committed the fraud charged in the said amended bill of complaint, and that the said Grand Canyon Cattle Company purchased said property and took conveyance thereof, with notice and knowledge, at the time of such purchase and conveyance, of the said fraud of said Saunders, and with knowledge of facts which put the said Grand Canyon Cattle Company on inquiry with respect to such fraud.

52. The said District Court erred in its decree dismissing the bill of complaint, for the reason that the evidence is insufficient to show and does not show that the said Grand Canyon Cattle Company, at the time of the purchase by and conveyance to it of the property described in the amended bill of complaint, had no notice or knowledge of the fraud committed by B. F. Saunders, and that such fraud on the part of said Saunders is clearly established by the evidence in this cause.

53. The said District Court erred in its decree dismissing [385] the bill of complaint, for the reason that its finding and conclusion that the said defendant Grand Canyon Cattle Company was a bona fide purchaser of the property described in the amended bill of complaint, without notice or

knowledge of the fraud of B. F. Saunders, is not sustained by the evidence but is contrary thereto.

WHEREFORE, by reason of the manifest errors aforesaid, the said United States of America prays that the said decree of the said District Court may be in all things annulled, reversed and held for naught, and that this Court do render its decree in favor of the said United States of America granting it the relief prayed in its said amended bill of complaint, or that it do remand this cause to the said District Court with directions to render such decree.

THOMAS A. FLYNN,

United States Attorney for the District of Arizona,
Solicitor for Appellant.

[Endorsements]: In the United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Grand Canyon Cattle Company, Appellee. Assignment of Errors. Filed Oct. 26, 1915. George W. Lewis, Clerk.
[386]

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

THE UNITED STATES OF AMERICA,
Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Corporation,
Appellee.

Prayer for Reversal.

To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit:

And now comes the United States of America, the above-named appellant, and prays for a reversal of the decree of the District Court of the United States for the District of Arizona, in a suit brought by the said The United States of America against Grand Canyon Cattle Company, a corporation, defendant, with whom were also named as defendants B. F. Saunders and Ora Haley, who were not served with process and did not appear in said suit, which said decree was entered in the office of the Clerk of said District Court on the 28th day of April, A. D. 1915.

THOMAS A. FLYNN,

United States Attorney for the District of Arizona,
Solicitor for Appellant.

[Endorsements]: In the United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Prayer for Reversal. Filed Oct. 26, 1915. George W. Lewis, Clerk. [387]

*In the District Court of the United States for the
District of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Stipulation Re Transmission of Original Exhibits.

It is hereby stipulated by and between the United States of America, by the United States Attorney for the District of Arizona, and the defendant Grand Canyon Cattle Company, a corporation, by its solicitors of record in this suit that the originals of certain exhibits introduced in evidence upon the trial of this suit and consisting of certain maps, drawings and photographs, may be sent to the United States Circuit Court of Appeals of the Ninth Circuit upon the appeal heretofore taken by the United States herein, in lieu of copies thereof, said exhibits being designated in the files and records of this suit, as Government's Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 13, 13a, 14, 15, 16, 17, 18, 19a, 19b, 20, 21, 23, 24, 25, 26, 27-P, 50-P, 51-P, 52-P, 53-P, 54-P, 55-P, and 56-P, and defendant Grand Canyon Cattle Company's Exhibit "A," and that an order may be made by the Judge of the District Court of the United States for the District of Arizona directing that such original exhibits be sent to said United States Circuit Court of Ap-

peals, and for the safekeeping, transporting and return thereof. This stipulation is made for the reason that it is impracticable, if not impossible, to make copies of said exhibits, and it is agreed that said original exhibits shall be deemed a part of the statement of evidence on such appeal, and shall have the same force and effect as if copies thereof were made a part of such statement of evidence, but copies of all such exhibits shall be inserted in the printed transcript of record on such appeal.

Dated February 7th, 1916.

THOMAS A. FLYNN,

United States Attorney for the District of Arizona.

O'MELVENY, STEVENS & MILLIKIN,

WALTER K. FULLER,

Solicitors for Defendant, Grand Canyon Cattle Company. [388]

[Endorsements]: No. E-49—Phoenix. In the District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. B. F. Saunders et al., Defendants. Stipulation that Certain Original Exhibits may be Sent to Circuit Court of Appeals. Filed Apr. 25, 1916, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [389]

*In the District Court of the United States for the
District of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Order Directing Transmission of Original Exhibits.

Order directing transmission of original exhibits
to the United States Circuit Court of Appeals.

Pursuant to stipulation between the United States
Attorney, counsel for the plaintiff and counsel for
the Grand Canyon Cattle Company that certain
original papers and exhibits, of which it is imprac-
ticable to make copies, may be sent to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit it is hereby

ORDERED that the clerk of this court be and he
is hereby directed to send by mail to the clerk of the
United States Circuit Court of Appeals for the
Ninth Circuit those certain exhibits consisting of
maps, drawings and photographs and designated
as Government's Exhibits numbers 3, 4, 5, 6, 7, 8, 9,
13, 12a, 14, 15, 16, 17, 18, 19a, 19b, 20, 21, 23, 24, 25,
26, 27-P, 50-P, 51-P, 52-P, 53-P, 54-P, 55-P, and
56-P, and Grand Canyon Cattle Company's Ex-
hibit "A," and that such original exhibits be deemed
a part of the statement of evidence upon the appeal

heretofore taken by the United States in this cause and shall have the same force and effect as if copies thereof were included in such statement of evidence and copies of all such exhibits shall be inserted in the printed record on such appeal.

The clerk of this court is directed to send the same by registered mail, requiring a return receipt therefor and when this cause shall have finally been determined by said Circuit Court of Appeals, said exhibits shall be returned in like manner to the clerk of this court.

Dated November 27, 1916.

WM. H. SAWTELLE,
United States District Judge, District of Arizona.
[390]

E-49—Phoenix. In the District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. B. F. Saunders, Grand Canyon Cattle Company, a corporation, and Ora Haley, Defendants. Order Directing the Transmission of Original Exhibits to Circuit Court of Appeals. Filed Nov. 27, 1916, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy.
[391]

*In the District Court of the United States for the
District of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Stipulation Re Approval of Statement of Evidence.

It is hereby stipulated between the plaintiff and the defendant Grand Canyon Cattle Company, that the statement of the evidence heretofore served and lodged with the clerk by the plaintiff, after incorporating therein all the amendments and corrections proposed by the defendant Grand Canyon Cattle Company may be approved and certified by the Judge before whom this cause was tried, in accordance with the form of certificate attached to said statement of evidence, without further notice.

Dated November 10th, 1916.

THOMAS A. FLYNN,
United States Attorney.

O'MELVENY, STEVENS, & MILLIKIN,
WALTER K. FULLER,

Solicitors for the Defendant Grand Canyon Cattle
Company.

[Endorsements]: No. E-49—Phoenix. In the District Court of the United States for the District of Arizona. United States of America, Plaintiff,

vs. B. F. Saunders, et al., Defendants. Stipulation.
Filed Nov. 27, 1916, at — M. Mose Drachman,
Clerk. By R. E. L. Webb, Deputy. [392]

*In the District Court of the United States for the
District of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

**Stipulation Re Extension of Time for Preparing, etc.
Statement of Evidence.**

It is hereby stipulated and agreed between counsel for the United States and the Grand Canyon Cattle Company, that, by various stipulations and orders, the time within which the plaintiff might prepare, serve, and lodge with the clerk of the above-named court a statement of the evidence in this cause was extended until and including the 25th day of April, 1916, on which date such statement was served and lodged with said clerk; that thereafter, by various orders and stipulations, the time of the defendant Grand Canyon Cattle Company to prepare, serve and file proposed amendments and corrections of such statement was extended until and including the 12th day of October, 1916, on which date such proposed amendments and corrections were served and lodged with the clerk of this court;

that copies of such orders and stipulations need not be made a part of the record on appeal, it being agreed that a copy of this stipulation may be made a part of such record in place of copies of the various orders and stipulations above mentioned.

THOMAS A. FLYNN,

United States Attorney.

O'MELVENY, STEVENS & MILLIKIN

and

WALTER K. FULLER,

Solicitors for Defendant, Grand Canyon Cattle Company. [393]

[Endorsements]: No. E-49—Phoenix. In the District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. B. F. Saunders et al., Defendants. Stipulation. Filed Dec. 2, 1916, at — M., Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [394]

*In the District Court of the United States for the
District of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY,

Defendants.

Praeceptum for Transcript of Record.

To the clerk of the Above-named Court:

You will please forward to the clerk of the United States Circuit Court of Appeals for the Ninth Cir-

cuit, copies of the following papers and records, as the record on the appeal heretofore taken by the United States of America from the decree heretofore rendered and entered in this cause:

1. The bill of complaint.
2. Stipulation waiving answer under oath.
3. Demurrer to bill.
4. Order sustaining demurrer to bill.
5. Amended bill of complaint.
6. Answer of defendant Grand Canyon Cattle Company to amended bill of complaint.
7. Replication.
8. Opinion of the Court.
9. Decree.
10. Notice of decree.
11. Statement of evidence.
12. Petition for appeal and order allowing appeal.
13. Assignments of error.
14. Prayer for reversal.
16. Stipulation for sending up certain original exhibits.
17. Order directing sending up original exhibits.
18. Stipulation that statement of evidence be certified and approved by Judge.
19. Stipulation taking place of copies of orders extending time to file record and proposed amendments.
20. This praecipe.

The clerk will also send to the Clerk of the United States Circuit Court of Appeals, the following original papers and documents, filed herein:

1. The exhibits as directed in the order requiring the sending up of certain original exhibits.

2. The citation on appeal, with admission of service.
3. The orders enlarging the time to file record and docket case in the United States Circuit Court of Appeals.

THOMAS A. FLYNN,

United States Attorney, for the District of Arizona.
[395]

[Endorsements]: No. E-49 (Phoenix). In the District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. B. F. Saunders, Grand Canyon Cattle Company, a Corporation, and Ora Haley, Defendants, Praeceptum for Record on Appeal. Filed Dec. 2, 1916, at — M, Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [396]

In the United States District Court for the District of Arizona.

IN EQUITY—No. 49 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. F. SAUNDERS et al.,

Defendants.

**Certificate of Clerk of United States District Court
to Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby

certify that the foregoing three hundred ninety-six (396) typewritten pages, numbered from one (1) to three hundred ninety-six (396), inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the decree of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit. [397]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the plaintiff for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause and which will be included in my quarterly account of fees earned from the United States for the quarter ending December 31, 1916, for settlement, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of record —1000 folios at 20¢ per folio.....	\$200.00
Certificate of clerk to typewritten transcript of record, 4 folios at 30¢ per folio.....	1.20
Seal of Court to said Certificate.....	.40
<hr/>	
Total,	\$201.60

I further certify that original orders, enlarging and extending the time within which to file the record and docket this cause in the United States Circuit Court of Appeals for the Ninth Circuit, dated October 22, 1915, November 13, 1915, December 6, 1915, January 3, 1916, March 24, 1916, May 8, 1916, July 28, 1916, September 27, 1916 and November 27, 1916, have heretofore been transmitted to you under separate cover; and that the original Citation and Government Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 13, 13a, 14, 15, 16, 17, 18, 19a, 19b, 20, 21, 23, 24, 25, 26, 27-P, 50-P, 51-P, 52-P, 53-P, 54-P, 55-P and 56-P and Defendant's Exhibit "A" in this cause are hereto attached and herewith transmitted.

WITNESS my hand and the seal of said District Court, affixed this 14th day of December, A. D. 1916, at Phoenix, Arizona.

[Seal]

MOSE DRACHMAN,

Clerk.

By R. E. L. Webb,

Deputy. [398]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THE UNITED STATES OF AMERICA,

Appellant,

vs.

B. F. SAUNDERS, GRAND CANYON CATTLE
COMPANY, a Corporation, and ORA
HALEY, Defendants, GRAND CANYON
CATTLE COMPANY, a Corporation,

Appellee.

Citation on Appeal.

United States of America,—ss.

To Grand Canyon Cattle Company, a Corporation,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State and Northern District of California, on the 23d day of November A. D. 1915, pursuant to an appeal duly allowed and filed in the office of the clerk of the District Court of the United States for the District of Arizona, wherein The United States of America is appellant and Grand Canyon Cattle Company, a corporation, is appellee, to show cause, if any there be, why the decree in the said appeal mentioned, to wit, the decree of the said District Court of the United States for the District of Arizona rendered and entered on the 28th day of April, 1915, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 26th day of October, A. D. 1915.

WM. H. SAWTELLE,
United States District Judge, District of Arizona.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Citation on Appeal. Due Service of and receipt of a copy of the within citation on Appeal is hereby ad-

mitted this 26th day of October, 1915. O'Melveny, Stevens & Millikin & Kibbey, Bennett & Bennett, Solicitors for Appellee. Filed Oct. 26, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

[Endorsed]: No. 2894. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Transcript of the Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed December 16, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

2894.

UNITED STATES OF AMERICA,
Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Cor-
poration,

Appellee.

**Order Enlarging Time to January 10, 1916, to File
Record and Docket Cause.**

It appearing that, by reason of the size of the rec-

ord in this cause and the time necessary to prepare a transcript thereof, it will be impossible to prepare the same and to file the record with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before November 23d, 1915, that being the return day of the citation heretofore issued and served, now therefore, for good cause shown, the undersigned, the Judge who signed said citation, does hereby order that the time to file the record in this case and to docket this case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the return day of said citation, be and the same is hereby enlarged and extended until and including the 10th day of January, 1916.

Done this 13th day of November, 1915.

WM. H. SAWTELLE,
United States District Judge, District of Arizona.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Order Enlarging Time to File Record and Docket Case. Filed Nov. 15, 1915. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES OF AMERICA,

Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Corporation,

Appellee.

**Order Enlarging Time to March 29, 1916, to File
Record and Docket Cause.**

It appearing that, by reason of the size of the record in cause and the time necessary to prepare a transcript thereof, it will be impossible to prepare the same and to file the record with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before January 10th, 1916, that being the enlarged return day of the citation heretofore issued and served, now therefore, for good cause shown, the undersigned, the Judge who signed said citation, does hereby order that the time to file the record in this case and to docket this case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the return day of said citation, be and the same is hereby enlarged and extended until and including the 29th day of March, A. D. 1916.

Done this 3d day of January, 1916.

WM. H. SAWTELLE,
United States District Judge, District of Arizona.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Order Further Enlarging Time to File Record and Docket Case. Filed Jan. 5, 1916. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

2894.

UNITED STATES OF AMERICA,

Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Cor-
poration,

Appellee.

**Order Enlarging Time to May 13, 1916, to File
Record and Docket Cause.**

It appearing that, by reason of the size of the record in this cause and the time necessary to prepare a transcript thereof, it will be impossible to prepare the same and to file the record with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before March 29th, 1916, that being the enlarged return day of the citation heretofore issued and served, now therefore, for good cause shown, the undersigned, the Judge who signed said citation, does hereby order that the time to file the record in this case and to docket this case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the return day of said citation, be and the same is hereby enlarged and extended until and including the 13th day of May, A. D. 1916.

Done this 24th day of March, 1916.

WM. H. SAWTELLE,

United States District Judge, District of Arizona.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Order Further Enlarging Time to File Record and Docket Case.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to —— to File Record Thereof and to Docket Case. Filed Mar. 27, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

2894.

UNITED STATES OF AMERICA,

Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Corporation,

Appellee.

Order Enlarging Time to August 3, 1916, to File Record and Docket Cause.

It appearing that, by reason of the size of the record in this cause and the time necessary to prepare a transcript thereof, it will be impossible to prepare the same and to file the record with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before May 13th, 1916, that being the enlarged return day of the citation heretofore issued and served, now therefore, for good cause

shown, the undersigned, the Judge who signed said citation, does hereby order that the time to file the record in this case and to docket this case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the return day of said citation, be and the same is hereby enlarged and extended until and including the 3d day of August, A. D. 1916.

Done this 8th day of May, 1916.

WM. H. SAWTELLE,
United States District Judge, District of Arizona.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Grand Canyon Cattle Company, Appellee. Order Further Enlarging Time to File Record and Docket Case. Filed May 10, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

2894.

UNITED STATES OF AMERICA,
Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Corporation,
Appellee.

**Order Enlarging Time to September 29, 1916, to File
Record and Docket Cause.**

It appearing that, by reason of the size of the record in this cause and the time necessary to prepare

a transcript thereof and the fact that additional time has been granted to the appellee to propose amendments to the statement of evidence, that it will be impossible to prepare such transcript and to file the record with the clerk of the United States Circuit Court of Appeals of the Ninth Circuit on or before August 3d, 1916, that being the enlarged return day of citation heretofore issued and served, now, therefore, for good cause shown, the undersigned, the Judge who signed said citation, does hereby order that the time to file the record in this case and to docket this case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the return day of said citation, be and the same is hereby enlarged and extended until and including the 29th day of September, A. D. 1916.

Done this 28th day of July, 1916.

WM. H. SAWTELLE,

United States District Judge, District of Arizona.

[Endorsed]: No. 49 (Phx.) In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Order Further Enlarging Time to File Record and Docket Case and Return Day of Citation. Filed July 28, 1916. Mose Drachman, Clerk. By R. E. L. Webb, Deputy.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Sept. 29, 1916, to File Record Thereof and to Docket Case. Filed Jul. 29, 1916. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

2894.

UNITED STATES OF AMERICA,

Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Cor-
poration,

Appellee.

**Order Enlarging Time to November 30, 1916, to File
Record and Docket Cause.**

It appearing that by reason of the size of the record in this cause and the time necessary to complete the statement of the evidence therein, it will be impossible to file a transcript of the record and to docket the case with the clerk of the United States Circuit Court of Appeals on or before the 29th day of September, 1916, the time now fixed by order therefor, now therefore, for good cause shown, the undersigned, the Judge who signed the citation on appeal, does hereby order that the time within which to file the record in this cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to docket the case in the said Circuit Court of Appeals be and the same is hereby enlarged and extended until and including the 30th day of November, 1916.

Dated September 27th, 1916.

WM. H. SAWTELLE,
United States District Judge, District of Arizona.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Order Further Enlarging Time to File Record and Docket Case.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 30, 1916, to File Record Thereof and to Docket Case. Filed Sept. 29, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

2894.

UNITED STATES OF AMERICA,

Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Corporation,

Appellee.

Order Enlarging Time to December 20, 1916, to File Record and Docket Cause.

It appearing that from the size of the record herein, and the fact that the statement of the evidence has recently been certified and filed, it will be impossible to prepare and file a transcript of the record and docket the case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before the 30th day of November, 1916, the time now fixed by order therefor, now therefore, for good cause shown, the undersigned, the Judge who

signed the citation on appeal, does hereby order that the time within which to file the record in this cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to docket the case in the said United States *circuit of Appeals*, be and the same is hereby extended and enlarged until and including the 20th day of December, 1916.

Dated November 27th, 1916.

WM. H. SAWTELLE,

United States District Judge, District of Arizona.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Grand Canyon Cattle Company, a Corporation, Appellee. Order Further Enlarging Time to File Record and Docket Case to Dec. 20, 1916. Filed Nov. 29, 1916. F. D. Monckton, Clerk.

No. 2894. United States Circuit Court of Appeals for the Ninth Circuit. Seven Orders Under Rule 16 Enlarging Time to Dec. 20, 1916, to File Record Thereof and to Docket Case. Refiled Dec. 16, 1916. F. D. Monckton, Clerk.

[illegible]

Scale: 1 mile to 4 inches

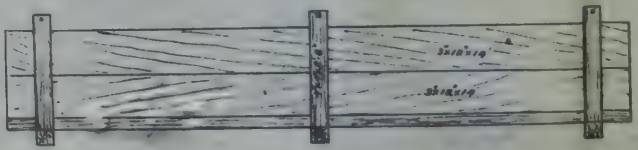
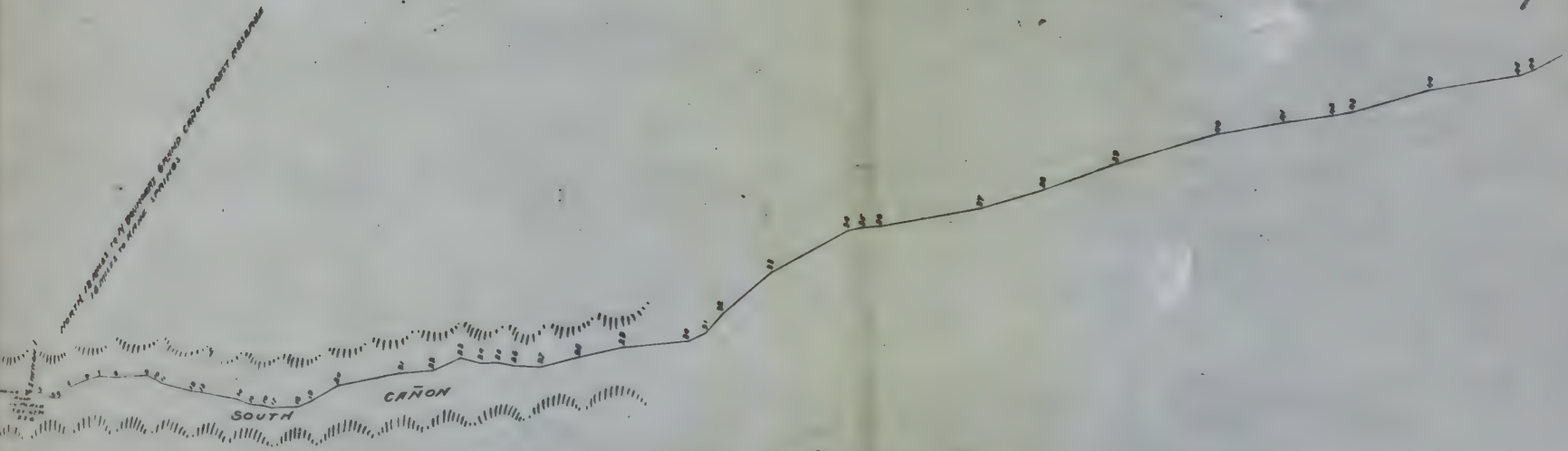
6X 4

Case No. 2894
U. S. Circuit Court of Appeals
For the Ninth Circuit
Filed DEC 18 1916
D. D. MORGENTHAU, Clerk

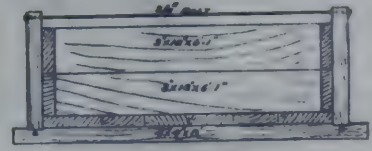
B. F. SAUNDERS
PIPE LINE AND RESERVOIR
ON
GRAND CANYON FOREST RESERVE
COCONINO COUNTY,
ARIZONA.

Scale: 400 feet to 1 inch

True North

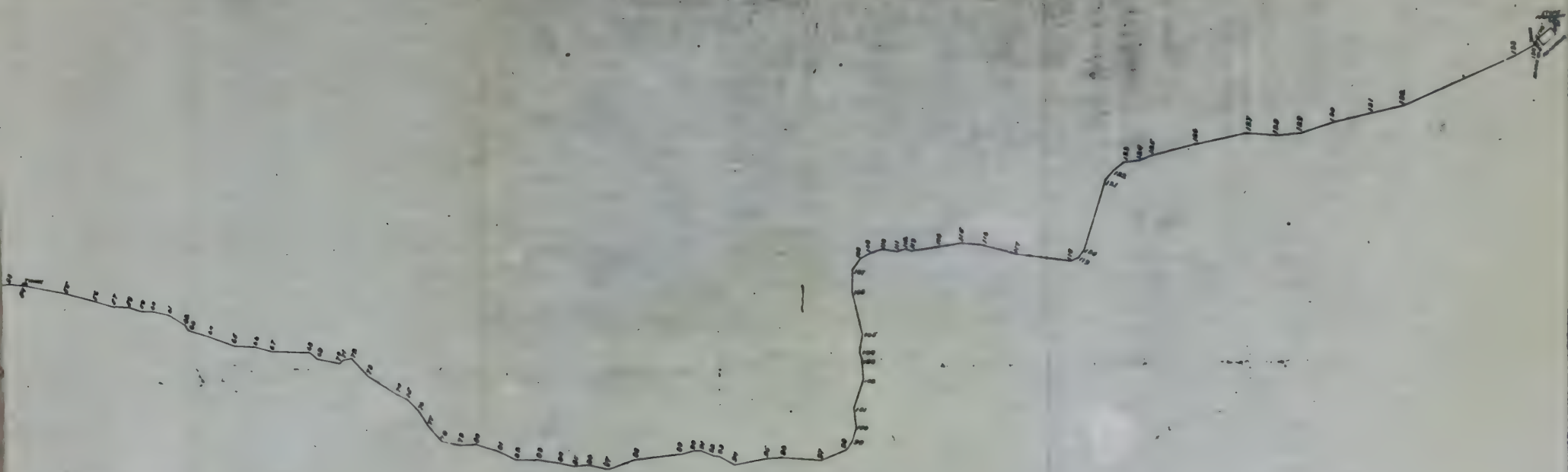


SIDE VIEW OF TANK
Scale: 2 ft to 1 inch



END VIEW OF TANK
Scale: 2 ft to 1 inch

STATE OF UTAH }
COUNTY OF KANE }
I, William H. Powell,
do hereby certify that the survey by B. F. SAUNDERS
described as follows: Beginning
at a high 2 ft base near Station 100
and continuing to Station 104 a total
of the reservoir whence a dam is to be
made by him as Surveyor of the said
day of Sept 1903 and ending on the 12
accuracy represents a proper grade
level line, which is the proposed and
represented upon this map and by the
or stream bed is used for the said p
Sworn and subscribed to before me this
I, B. F. SAUNDERS do hereby certify
the accompanying affidavit is the
of the said pipe line and reservoir
accompanying field notes was made
reservoir as represented on this map
day of Sept 1903 in the presence of
Beginning at station 1 of the pipe line and
also a balance between Indian Agency
on the east side of the reservoir, where
beginning at Station 1 of the reservoir, where
and that the map has been prepared to be filed
the bridge of sections 1 to 12 inclusive of the
culture laws, and for other purposes and for
the right of way herein described as per plat



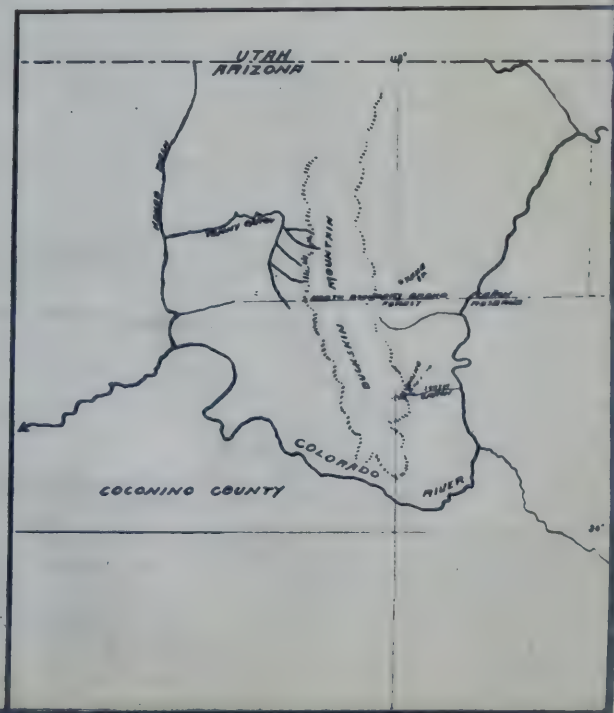
Surveyor's Certificate.

adly being duly sworn says he is the surveyor employed
 as, that the survey of said C.R. SPOONER'S pipeline and
 ving at station 1, of the pipe line, where a sandstone rock on
 230 ft. also a Balsam tree 10 ins in diam bears S 62° 30' E 300 ft.
 in South Canyon on the east side of the BUCKHORN mountains,
 length of 3,460 ft and 510 ft. Also beginning at station 1,
 monument bears N 70° 17' 30" E. Containing an area of 5000 sq. ft.
 of C.R. SPOONER'S and under his authority, commencing on the 27th
 day of April, 1890, and that the survey of said pipe line
 line for the flow of water in the pipe line, and accurately represents
 line of the said reservoir, and that such survey is accurately
 is accompanying field notes, and that no lake or lake bed, stream
 line and reservoir except as shown on this map.

day of March 1904
 Surveyor
 Notary Public.

Applicants Certificate.

that I am the applicant; that Hiram N. POWDER who subscribed
 surveyor employed to make the survey by me, that the survey
 as accurately represented on this map and by the
 note under my authority; that the said pipe line and
 and by said field notes was adopted by me on the 18th
 location of the said pipe line and reservoir described as follows:
 hence a sandstone rock in place, 1 ft high, 8 ft base, bears S 62° 30' E 300 ft.
 100 ft 30 ft and identical with the outlet of a spring in South Canyon
 and continuing to Sta. 150, a total length of 3,460 ft and 510 ft. Also
 as a sandstone monument bears N 70° 17' 30" E. Containing an area of 5000 sq. ft.
 and is used for the said pipe line and reservoir except as shown on this map
 for the approval of the Secretary of the Interior in order that I may obtain
 a Act of Congress approved March 3, 1891 entitled "An act to repeal timber
 title of the Act approved May 11, 1880. And I further certify that
 the purposes.



[illegible]

Scales: 200 ft. to 1 inch

Case No. 2894
 Circuit Court of Appeals
 For the Ninth Circuit
 vs. Double
 Dated DEC. 18. 1916
 P. D. MANGETON, Clerk

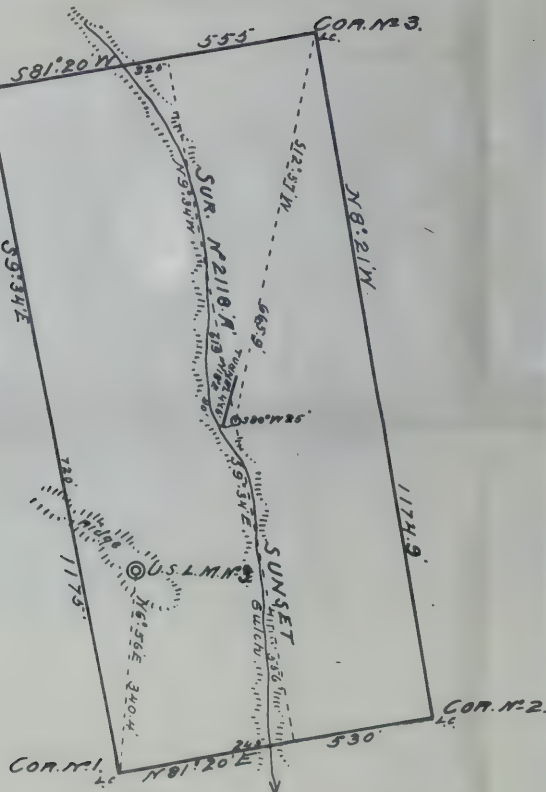


Survey N-2140.
Prescott Land District.
Warm Springs Mining District.
Surveyed Sept. 12 1905.
By John J. Bucknow
U. S. Dep. Min. Surveyor.
Scale: 200 ft. to 1 inch.

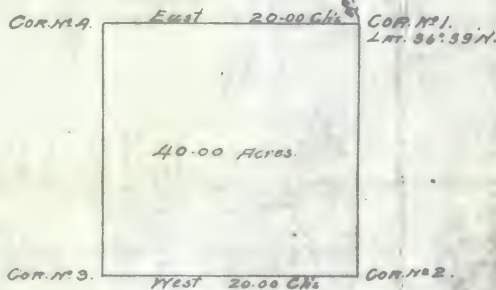


Unsurveyed Land.

Survey N^o 2118 A & B.
 Warm Springs Mining District
 Prescott Land District.
 Coconino County,
 Arizona Territory.
 Surveyed June 29-30 1905.
 By John J. Breckon
 U. S. Deputy Mineral Surveyor
 Scale: 200 ft. to 1 inch.



N



I hereby certify that this map correctly represents the Jacobs Pools Trust applied for by B. F. SAUNDERS, as actually surveyed by me May 28 1906. Situated on unsurveyed land, in HOUSE ROCK VALLEY on the east side of Buckskin Mountain, in Coconino County, ARIZONA TERRITORY.

From Cor. N. 1, which is a cedar post 4 ft. long, 4 ins. sq. set 1 1/2 ft. in the ground and mound of stone 3 ft. base, 2 ft. high, marked "Cor. N. 1. NE. Cor." the S.E. cor. of stone house bears N 14° 15' W 3.50 miles. Jacobs Pools Spring bears N 7° 50' W 3.774 miles. thence South 20.00 Chains to Cor. N. 2, a cedar post 4 ft. long, 4 ins. sq. set 1 1/2 ft. in the ground and mound of stone, marked "Cor. N. 2. SE. Cor." thence West 20.00 Chains to Cor. N. 3, a cedar post 4 ft. long, 4 ins. sq. set 1 1/2 ft. in the ground and mound of stone, marked "Cor. N. 3. SW. Cor." thence North 20.00 Chains to Cor. N. 4, marked "Cor. N. 4. NW. Cor." thence East 20.00 Chains to Cor. N. 1 the place of beginning.

Containing 40 Acres. Jacobs' claim to 3 acres.

JOHN J. BUCKLE
JUNE 18 1906.

John J. Buckle
U.S. Dep Min. Surveyor



I hereby certify that this map correctly represents the KANE SPRINGS HORSE TRACT applied for by B.F. SAWDERS, as actually surveyed by me Feb. 14-1904, situated on unsurveyed land in HOUSE ROCK VALLEY at the mouth of KANE CANYON on the east side of the BUCARIN MOUNTAINS, COCONINO COUNTY, ARIZONA TERRITORY.

From Cor. N. 1, which is a cedar post 4 ft. long, 4 ins. Sq. set 1 1/2 ft. in the ground and mound of stone 5 ft. base, 2 ft. high, marked Cor. N. 1. SW. corner the S.E. corner of stone house a 20 ft. base N 26° 30' E 340 ft. thence East 1320 ft. a pine post 4 ft. long, 4 ins. Sq. set 1 1/2 ft. in the ground and mound of stone, marked Cor. N. 2 S.E. corner thence North 120 ft. to Cor. N. 3 a cedar post 4 ft. long, 4 ins. Sq. set 1 1/2 ft. in the ground and mound of stone, marked N.E. corner Cor. N. 3. thence West 120 ft. to Cor. N. 4 a cedar post 4 ft. long, 4 ins. Sq. set 1 1/2 ft. in the ground and mound of stone, marked Cor. N. 4 N.W. corner thence South 1320 ft. to Cor. N. 1 the place of beginning, containing an area of 40 Acres. Variation 10° E.

John J. Buckner
U.S. Deputy Min. Surveyor

SALT LAKE CITY UTAH
March 26 1904



Government
 Exhibit No 13
 for Identification
 (T. H. S.)

Inv. No 13 in U. S. A. & Saunders
 Admitted & Filed Jan 15, 1910
 H. J. H. H. H. H. H.

FOREST SERVICE U. S. DEPT. OF AGRICULTURE
 1910

KAIBAB NATIONAL FOREST ARIZONA

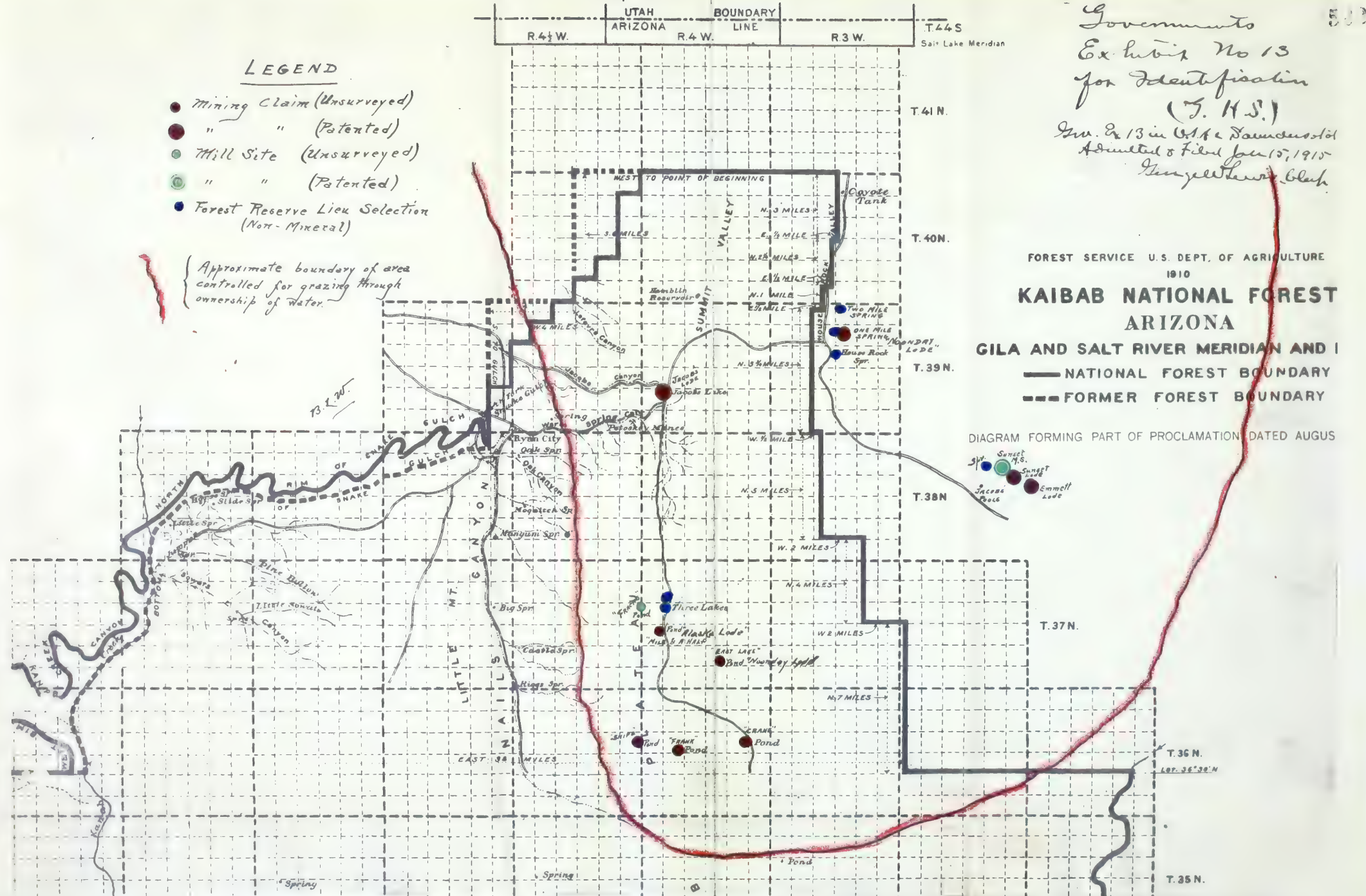
GILA AND SALT RIVER MERIDIAN AND I
 — NATIONAL FOREST BOUNDARY
 --- FORMER FOREST BOUNDARY

DIAGRAM FORMING PART OF PROCLAMATION DATED AUGUS

LEGEND

- Mining Claim (Unsurveyed)
- " " (Patented)
- Mill Site (Unsurveyed)
- " " (Patented)
- Forest Reserve Lick Selection (Non-Mineral)

{ Approximate boundary of area
 controlled for grazing through
 ownership of water.





Government's Exhibit No. 13-A.

**KAIBAB NATIONAL FOREST
ARIZONA**

**BY THE PRESIDENT OF THE UNITED
STATES OF AMERICA**

A PROCLAMATION

WHEREAS an Executive Order dated July second, nineteen hundred and eight, directed that all of the Grand Canyon National Forest lying north of the Colorado River should constitute the Kaibab National Forest; and

WHEREAS it appears that the public good will be promoted by adding to the Kaibab National Forest certain lands within the Territory of Arizona which are in part covered with timber, and by eliminating from said Forest certain lands;

Now, therefore, I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power in me vested by the Act of Congress approved June fourth, eighteen hundred and ninety-seven, entitled "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," do proclaim that the boundaries of the Kaibab National Forest are hereby changed and that they are now as shown on the diagram forming a part hereof.

The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws or reserved for any public purpose, be subject to and shall not in-

terfere with or defeat legal rights under such appropriation, nor prevent the use for such public purpose of lands so reserved, so long as such appropriation is legally maintained or such reservation remains in force.

This proclamation shall not prevent the settlement and entry of any lands heretofore opened to settlement and entry under the Act of Congress approved June eleventh, nineteen hundred and six, entitled "An Act To provide for the entry of Agricultural lands within forest reserves."

The lands hereby eliminated from the Kaibab National Forest which are not embraced in withdrawals for administrative sites for use in the management of the Forest, or in any other reservation or appropriation, shall be restored to the public domain and become subject to settlement under the general provisions of the homestead laws on such date and after such notice by publication as the Secretary of the Interior may prescribe, but shall not become subject to entry, filing, selection, or other form of appropriation until the expiration of thirty days from the date so fixed, except that on the same date as the lands eliminated become subject to settlement, the Territory of Arizona may, if the lands eliminated are subject to such selection, select as indemnity in the satisfaction of its common school grant, not to exceed two sections of land in each entire township restored, or one section in each fractional portion of a township where the restored area thereof exceeds five thousand (5,000) acres, and no person will be permitted to acquire or exercise any right whatever

under any settlement or occupancy begun prior to such date, and all such settlement or occupation is hereby forbidden.

It is not intended by this proclamation to modify the proclamations heretofore issued establishing the Grand Canyon National Game Preserve and the Grand Canyon National Monument, both of which include lands embraced in the boundaries of the Kaibab National Forest.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 23d day of August, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fifth.

[Seal]

WM. H. TAFT.

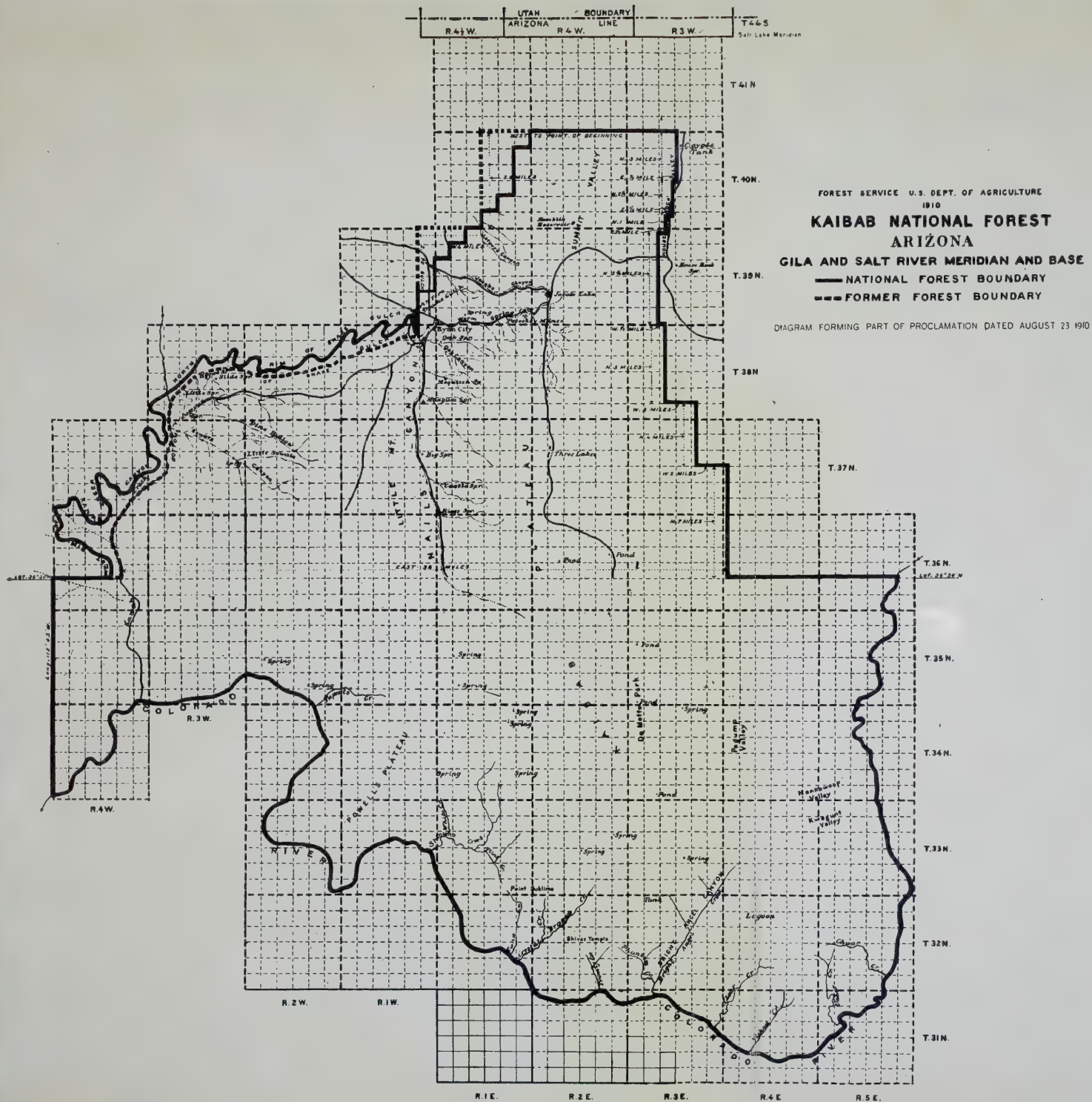
By the President:

HUNTINGTON WILSON,
Acting Secretary of State.

[No. 1079.]

[Endorsed]: Gov. Ex. 13-A in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 15, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 13-A. Filed Dec. 18, 1916. F. D. Monekton, Clerk.





Government's Exhibit No. 14.



[Endorsed]: Government's Exhibit No. 14 for Identification. Filed Dec. 12, 1913, with Deposition No. 28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. 14. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 15.

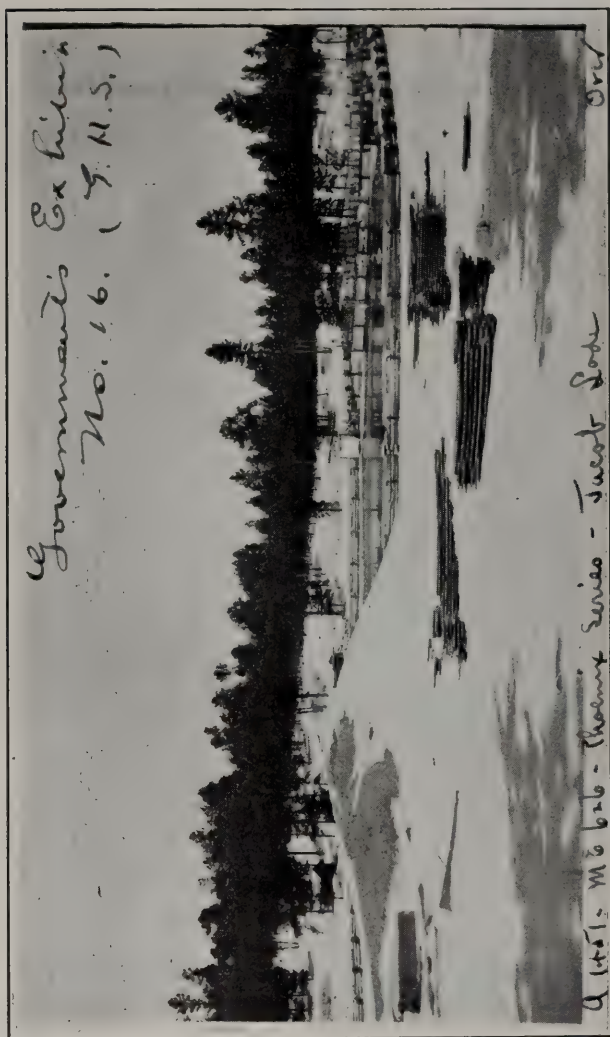


Looking northerly from point just south of south end line of Jacob lode showing lake and buildings on the claim.

[Endorsed]: Government's Exhibit No. 15. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 15 in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Ex. 15. Filed Dec. 18, 1916. F. D. Monekton, Clerk.

Government's Exhibit No. 16.

From Cor. #4 looking N. 35° W. showing Jacob Lake, corrals, sawdust pile in foreground at left of sawdust pile. Buckskin Mts., Ariz. Oct. 1908.

[Endorsed]: Government's Exhibit No. 16. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 16 in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Ex. 16. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

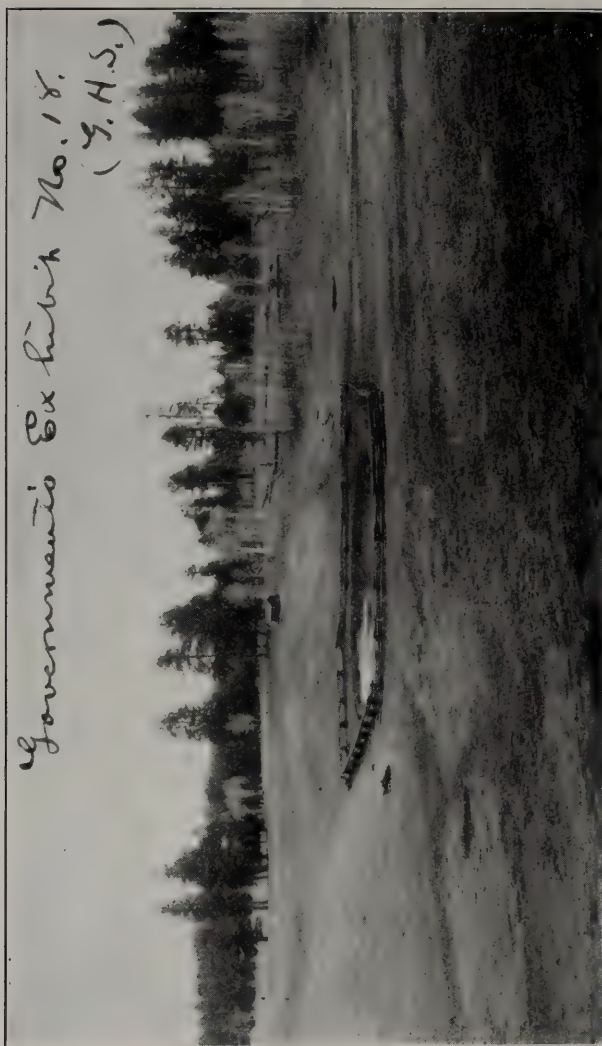
Government's Exhibit No. 17.

Caved shaft just north of sawmill and outside of fence about lake.
The other shaft is located at right of picture and covered by water.

[Endorsed]: Government's Exhibit No. 17. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 17 in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk.

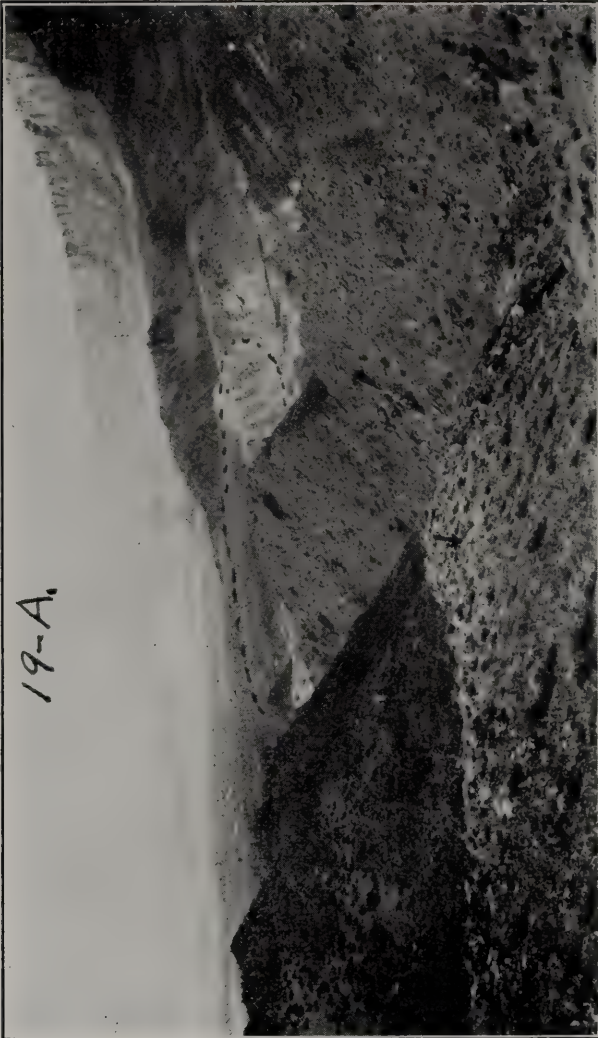
No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit No. 17. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 18.

[Endorsed]: Government's Exhibit No. 18. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By. R. E. L. Webb, Deputy.

Gov. Ex. 18 in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk.

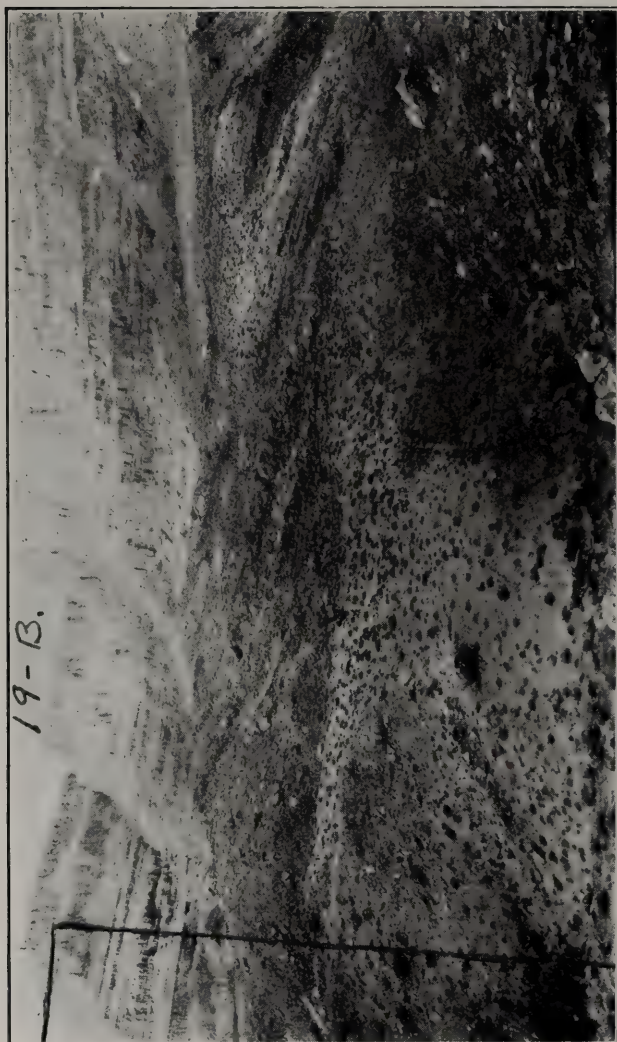
No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 18. Filed Dec. 18. 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 19-A.

[Endorsed]: Government's Exhibit 19-A. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 19-A in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk.

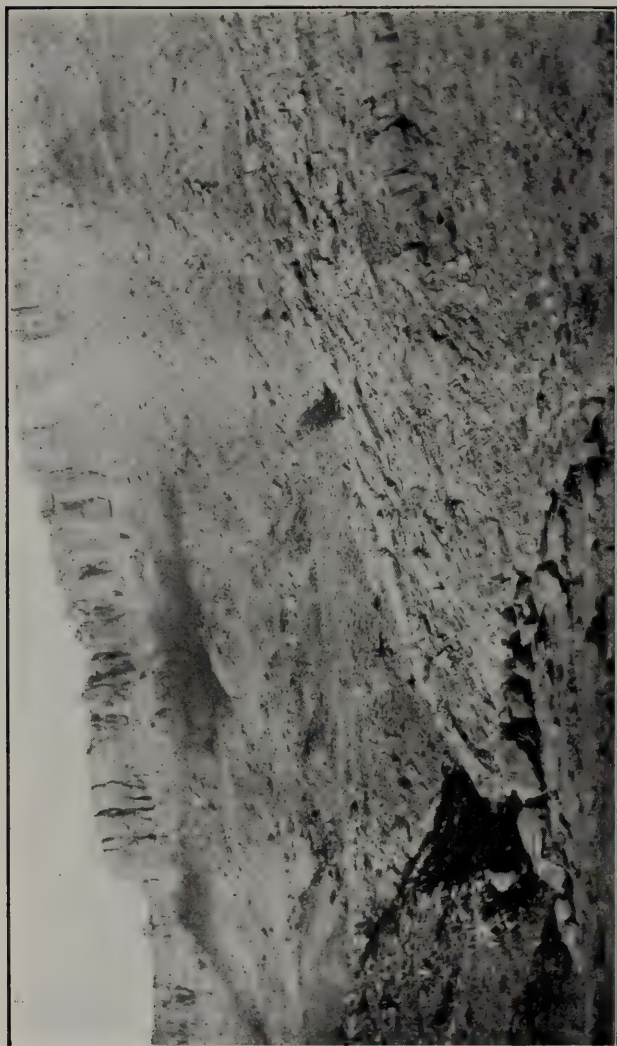
No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 19-A. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 19-B.

[Endorsed]: Government's Exhibit No. 19-B. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 19-B in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk.

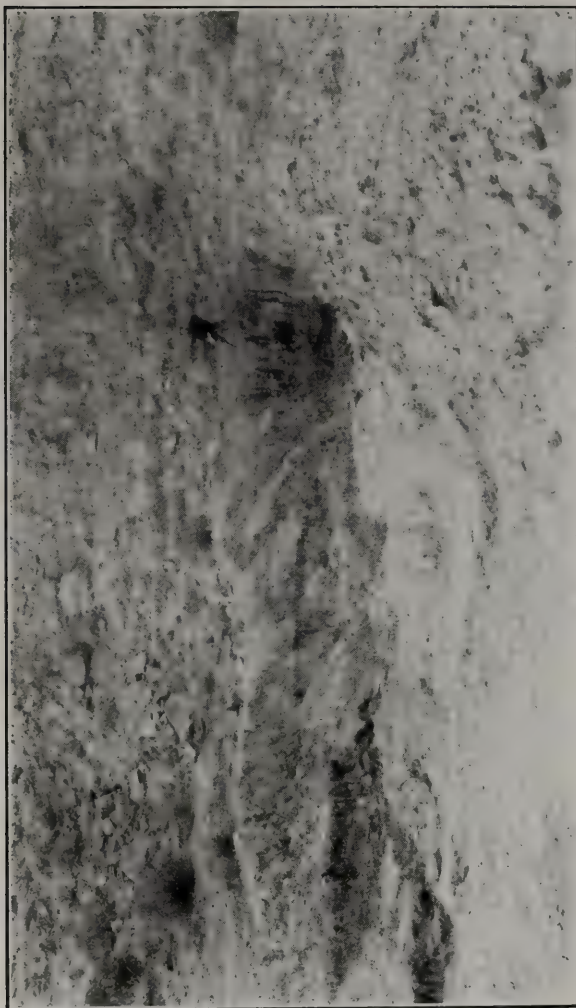
No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit No. 19-B. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 20.

[Endorsed]: Government's Exhibit No. 20. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 20 in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk.

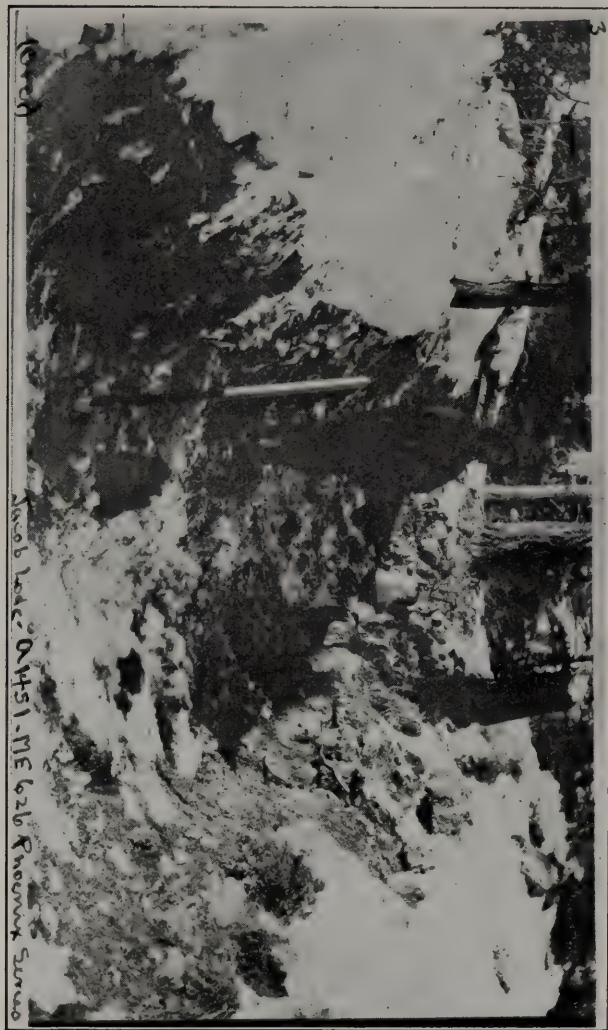
No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 20. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 21.

[Endorsed]: Government's Exhibit No. 21. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 21 in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 21. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

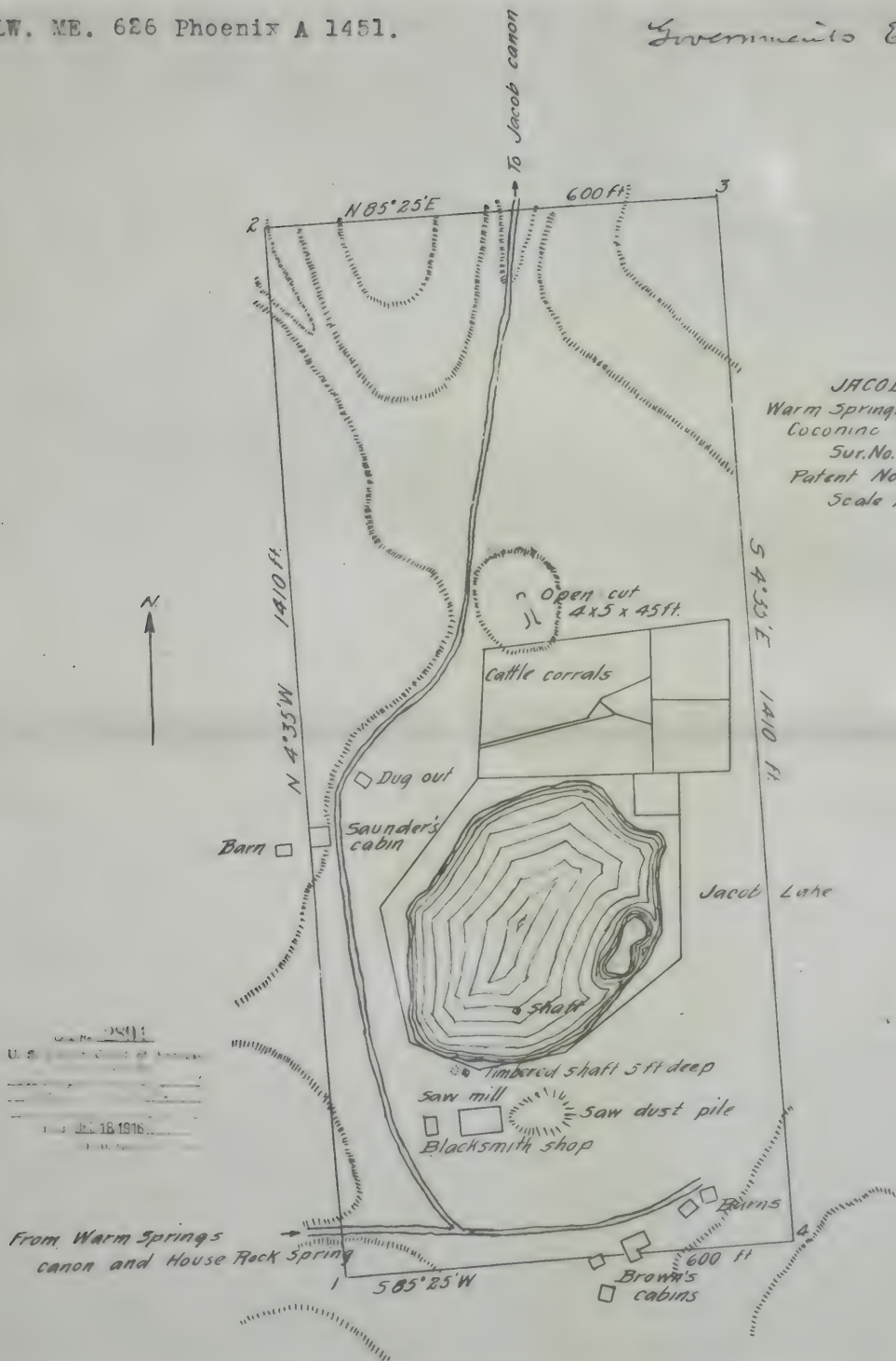
Government's Exhibit No. 23.

Cut No. 1 at north side of Jacob Lake.

[Endorsed]: Government's Exhibit No. 23. (G. H. S.) Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

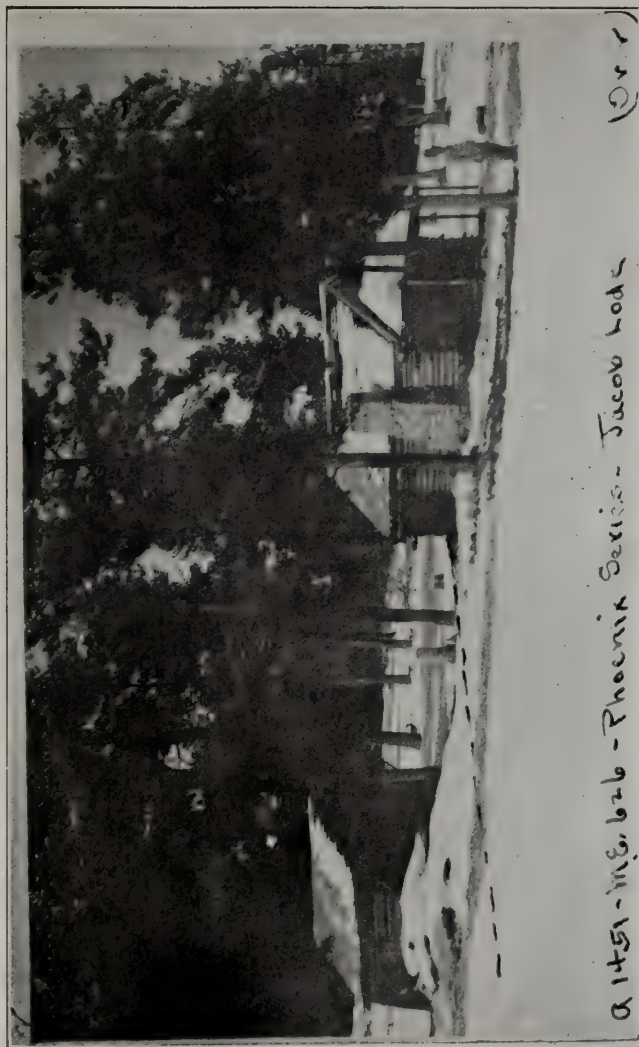
Gov. Ex. 23 (G. H. S.) in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 12, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 23. (G. H. S.) Filed Dec. 18, 1916. F. D. Monckton, Clerk.



JACOB LODE
Warm Springs Mining District
Coconino Co. Arizona
Sur. No. 1923
Patent No. 42,246
Scale 1" = 200'

Government's Exhibit No. 25.



Q 1451-McG. 626 - Phoenix Series - Jacob Lode (Dr.)

Saunders cabin and barn. West side line of Jacob Lode indicated by dotted line.

[Endorsed]: Government's Exhibit No. 25.
(G. H. S.) Filed Dec. 12, 1913, with Dep. #28.
George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 25 (G. H. S.) in U. S. A. vs. Saunders
et al. Admitted and Filed Jan. 12, 1915. George W.
Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the
Ninth Circuit. Govt's. Exhibit 25. (G. H. S.)
Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 26.



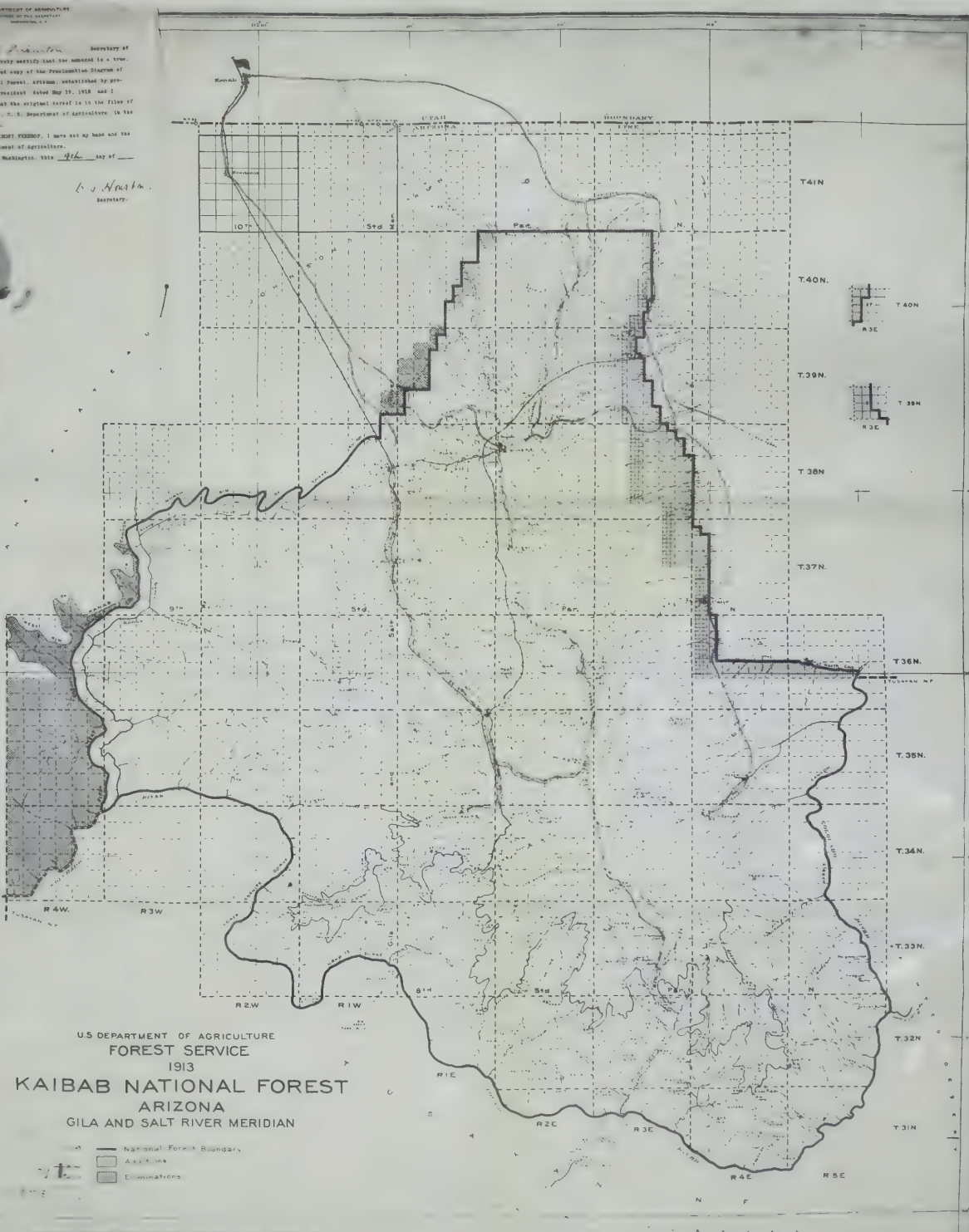
[Endorsed] : Government's Exhibit No. 26. Filed Dec. 12, 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 26. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

I, *L. S. Preston*, Secretary of Agriculture, do hereby certify that the enclosed is a true and correct copy of the Proclamation signed by the President of the United States, effective September 16, 1908, and I further certify that the original forest is in the files of the Bureau of Land Management, U. S. Department of Agriculture, in the City of Washington.

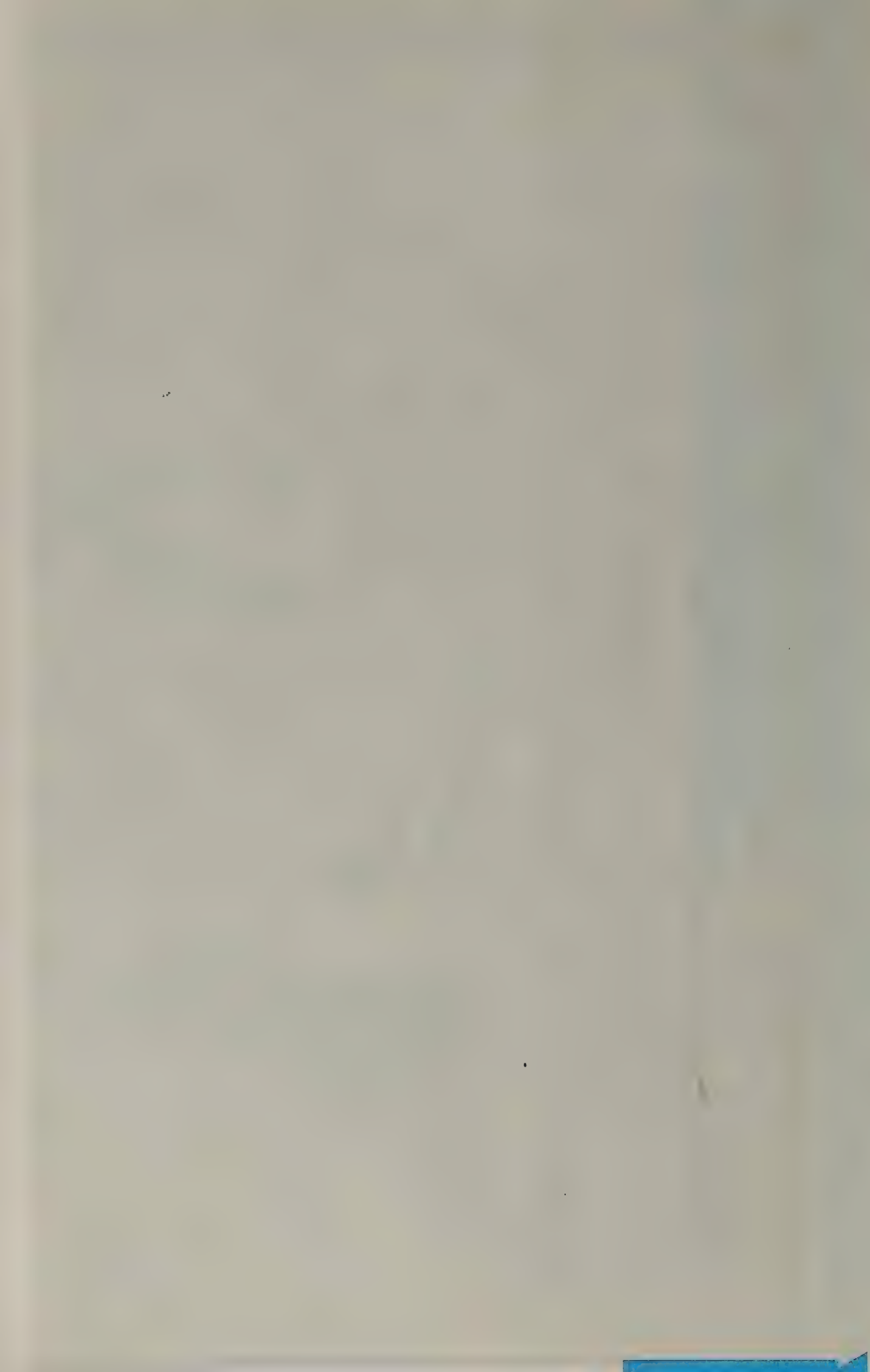
IN WITNESS WHEREOF, I have set my hand and the seal of the Department of Agriculture.
Done at Washington, this *14th* day of *April*, 1913.

L. S. Preston
Secretary



U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
1913
KAIBAB NATIONAL FOREST
ARIZONA
GILA AND SALT RIVER MERIDIAN

— National Forest Boundary
— Additions
— Eliminations



Government's Exhibit No. 50-P.



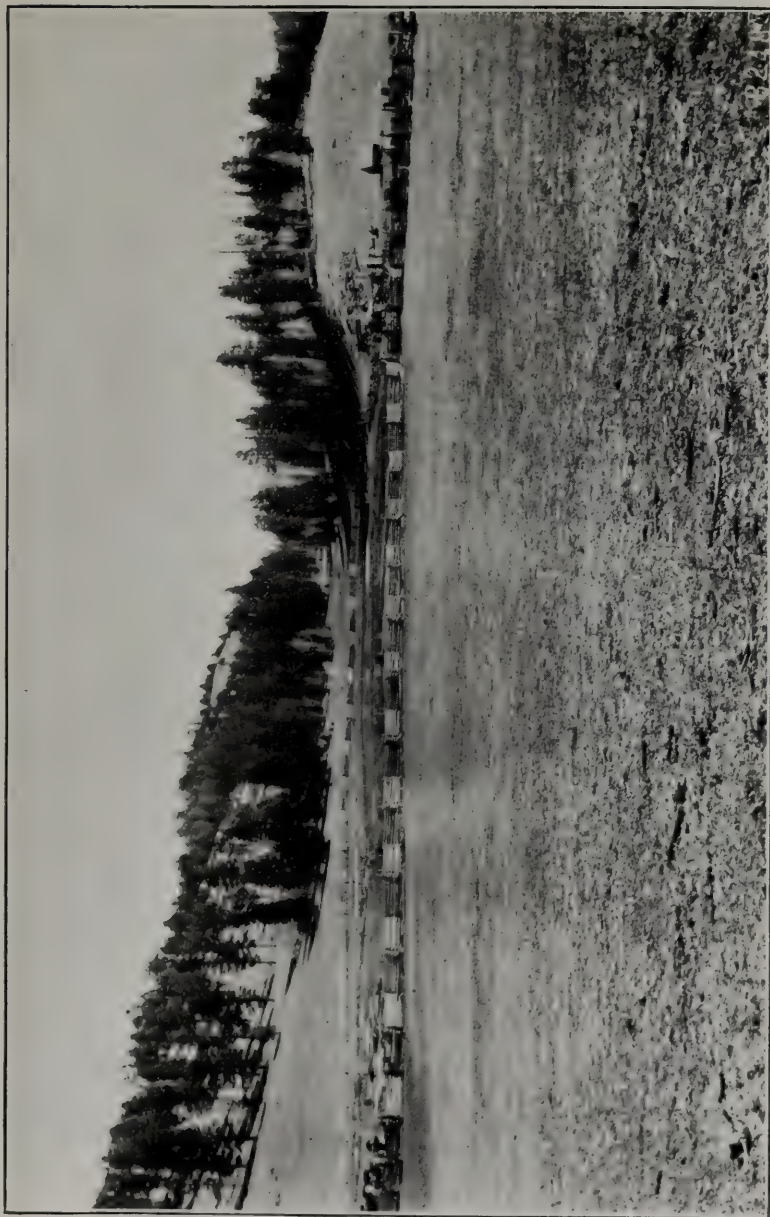
East Lake ("Noonday" claim, unpatented). Taken from point about 150 ft. NE. of lake; camera pointing SW.

[Endorsed]: Gov. Ex. 50-P. Filed Dec. 12, 1913, with Deposition #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 50-P in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 15, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 50-P. Filed Dec. 18, 1916. F. D. Monekton, Clerk.

Government's Exhibit No. 51-P.



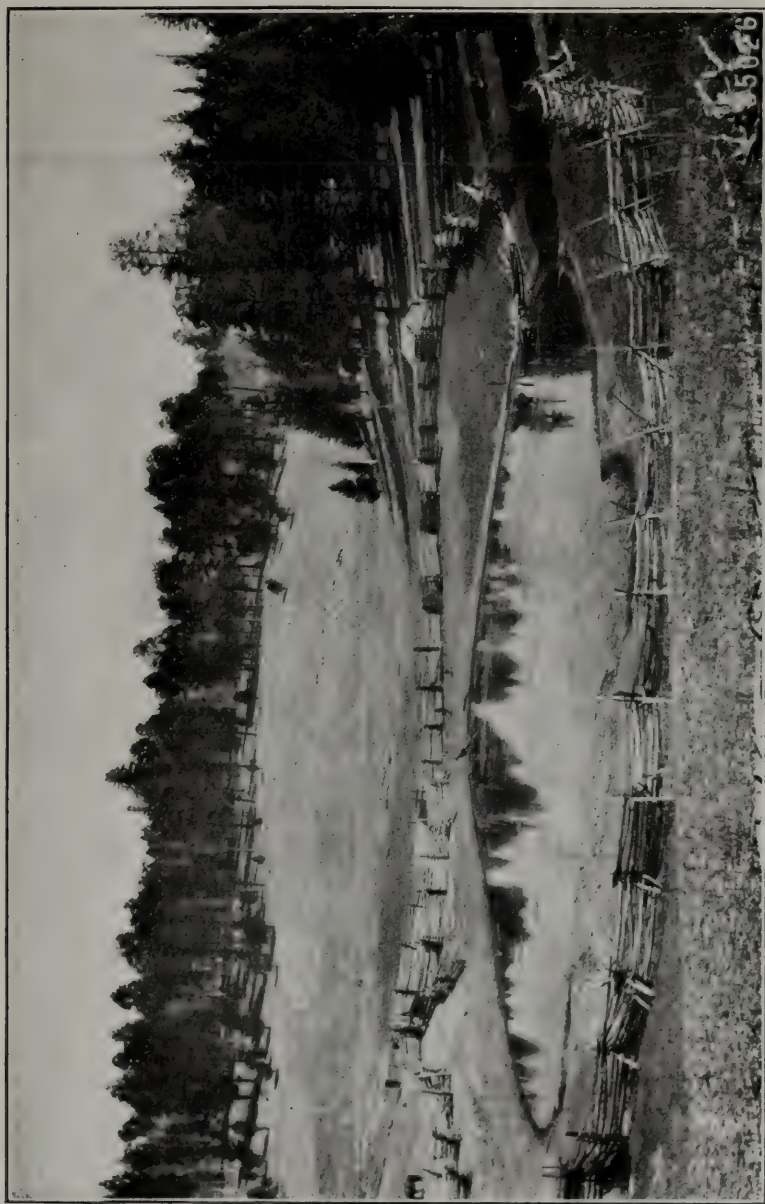
Crane Lake, taken from point about 500 ft. west of lake; camera pointing SE.

[Endorsed]: Gov. Ex. 51-P. Filed Dec. 12 1913, with Deposition #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 51-P in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 15, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 51-P. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 52-P.



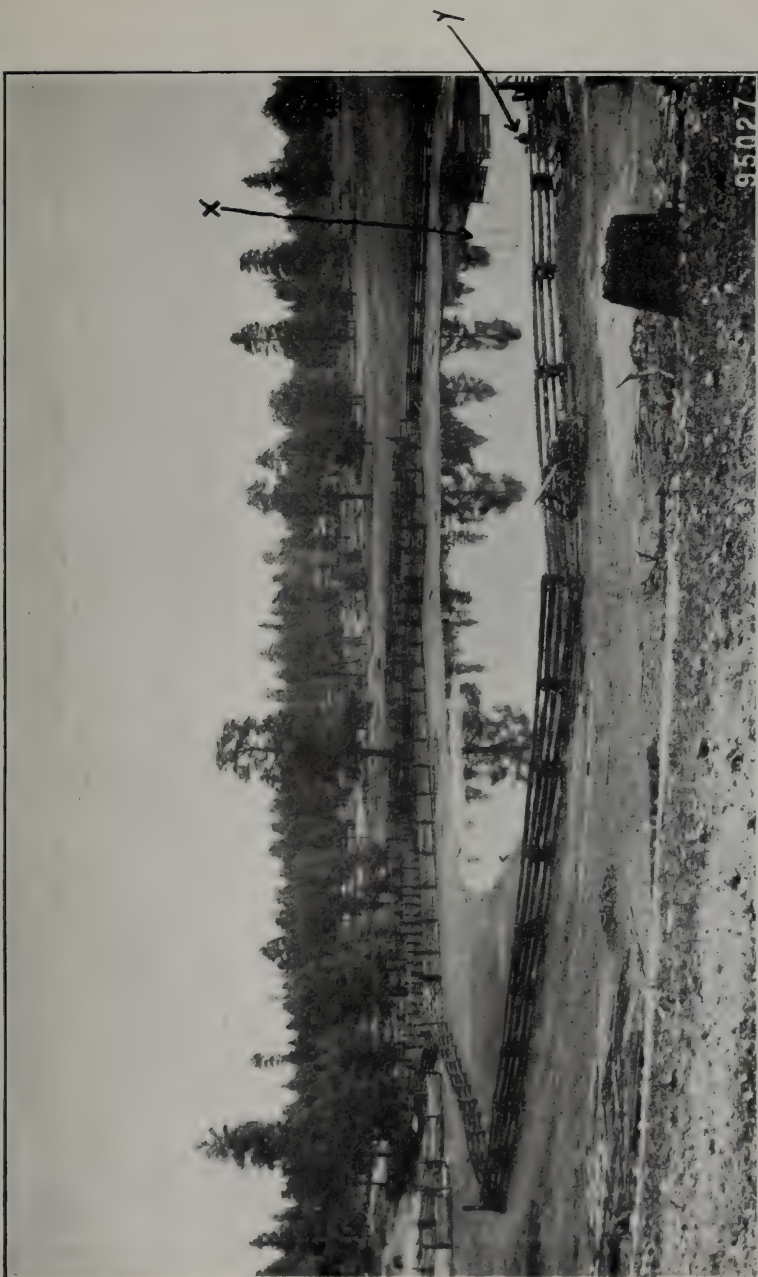
Snipe lake, camera pointing East.

[Endorsed]: Gov. Ex. 52-P. Filed Dec. 12 1913, with Dep. #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 52-P in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 15, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 52-P. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 53-P.



Jacob's Lake. Photo taken from near Cor. 1-1923 (Jacob's Lode) camera pointing NE, diagonally across claim.

x Indicates old frame work, in the lake at the location of "Shaft No. 2" mentioned in field-notes of M. S. 1923.

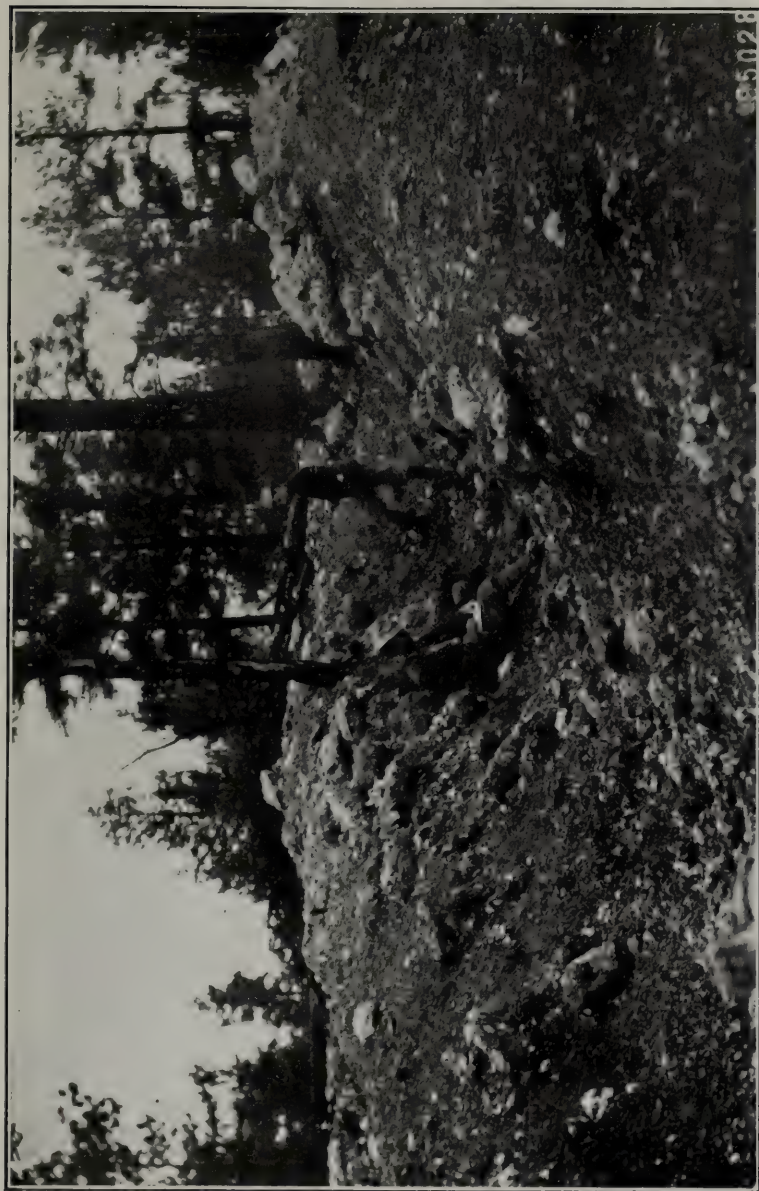
y Indicates Mr. T. C. Hoyt at remains of pit or well, at edge of lake.

[Endorsed]: Gov. Ex. 53-P. Filed Dec. 12 1913, with Deposition #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 53-P in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 15, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 53-P. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 54-P.



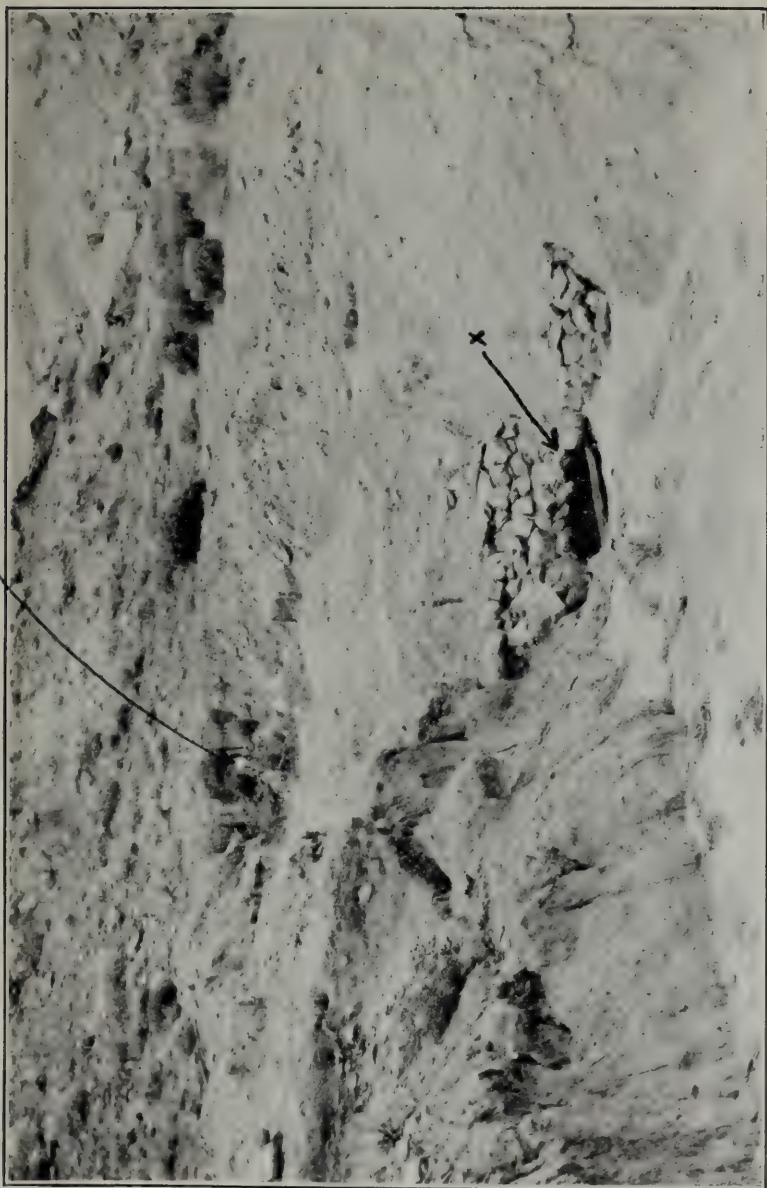
Location—(discovery) cut on the Jacob's Lode claim, M. S. 1923. Camera at mouth, pointing along the centre of cut.

[Endorsed]: Gov. Ex. 54-P. Filed Dec. 12 1913, with Dep. #20. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 54-P in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 15, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 54-P. Filed Dec. 18, 1916. F. D. Monckton, Clerk.

Government's Exhibit No. 55-P.

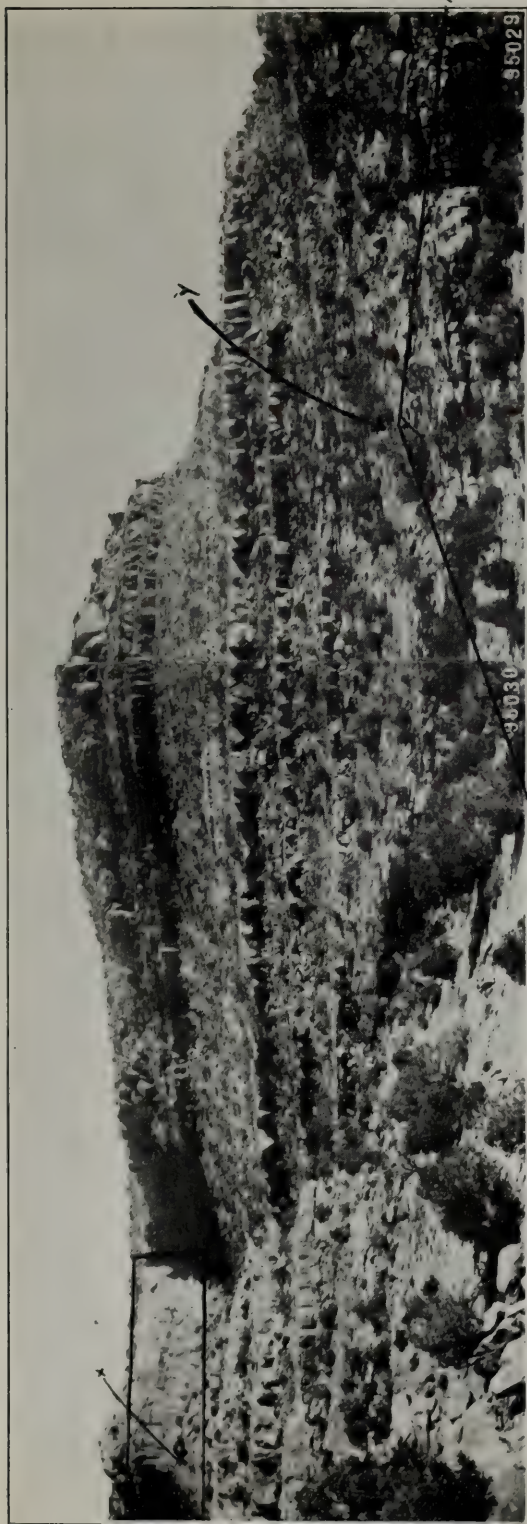


Open cut and mouth of tunnel (x) on Emmett Lode claim. Camera pointing north.
y Indicates Mr. W. L. Walker standing at face of open cut.

[Endorsed]: Gov. Ex. 55-P. Filed Dec. 12, 1913, with Deposition #28. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

Gov. Ex. 55-P in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 15, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's Exhibit 55-P. Filed Dec. 18, 1916. F. D. Monekton, Clerk.



Showing character of the land in the Noonday Lode (patented) and part of the adjacent "One-mile" lieu selection 4003, (Phoenix 09301).

x indicates U. S. L. M. #5, within the Noonday claim; exterior lines indicate approximate boundary lines of Noonday claim, M. S. 2140.

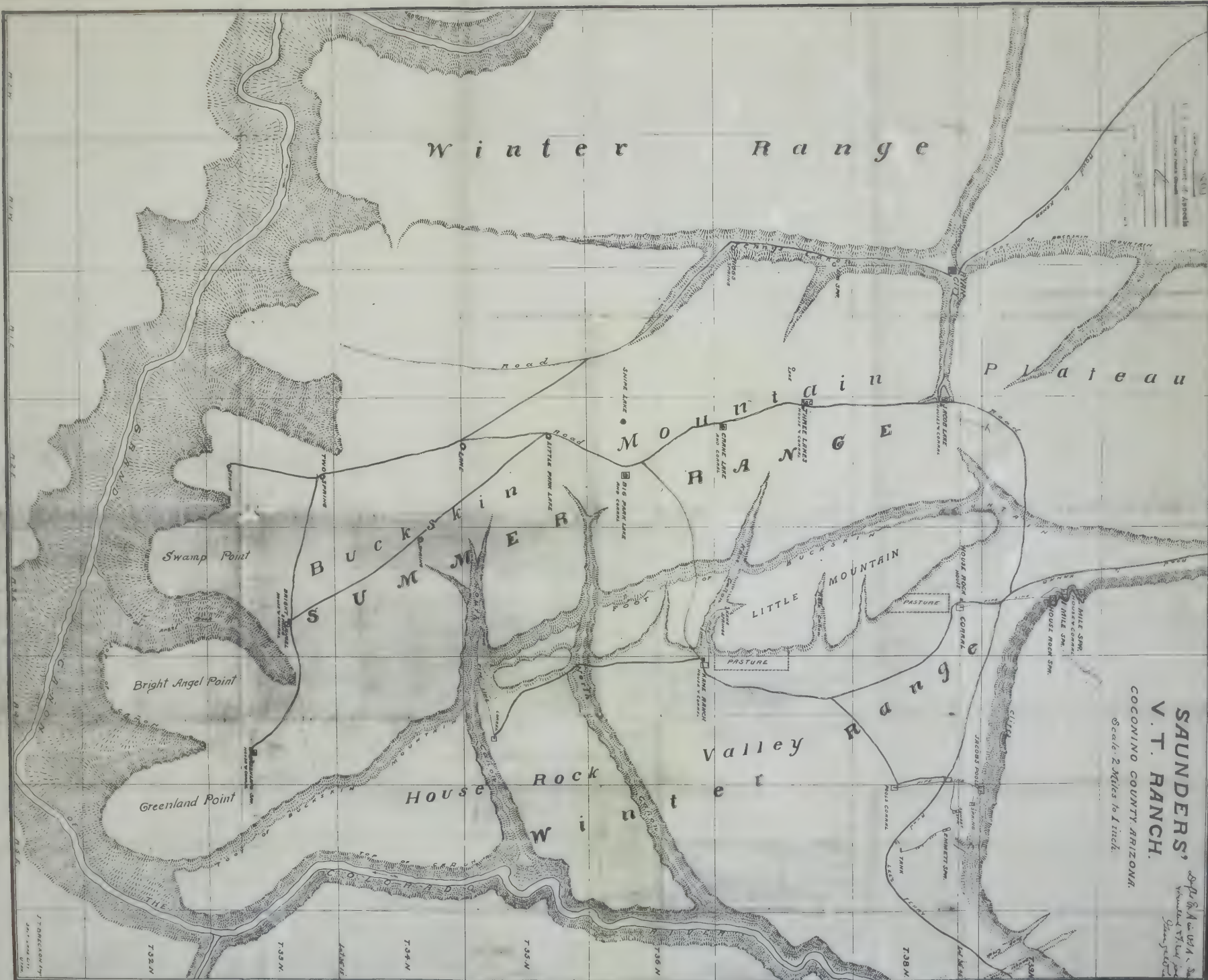
y indicates Mr. W. L. Walker (holding two sheets of white paper, at arm's-length) at the SE. corner of the "One-mile" lieu selection tract.

Line YA indicates approximate south boundary line of the "One-mile" lieu selection tract.

Line YB indicates approximate east boundary line of the "One-mile" lieu selection tract.

[Endorsed]: Gov. Ex. 56-P in U. S. A. vs. Saunders et al. Admitted and Filed Jan. 15, 1915. George W. Lewis, Clerk.

No. 2894. U. S. Circuit Court of Appeals for the Ninth Circuit. Govt's. Exhibit 56-P. Filed Dec. 18, 1916. F. D. Monckton, Clerk.





No. 2894.

**In the United States Circuit Court of Appeals
for the Ninth Circuit.**

UNITED STATES OF AMERICA, Appellant,

v.

GRAND CANYON CATTLE COMPANY, a corporation.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA.*

BRIEF FOR THE UNITED STATES.

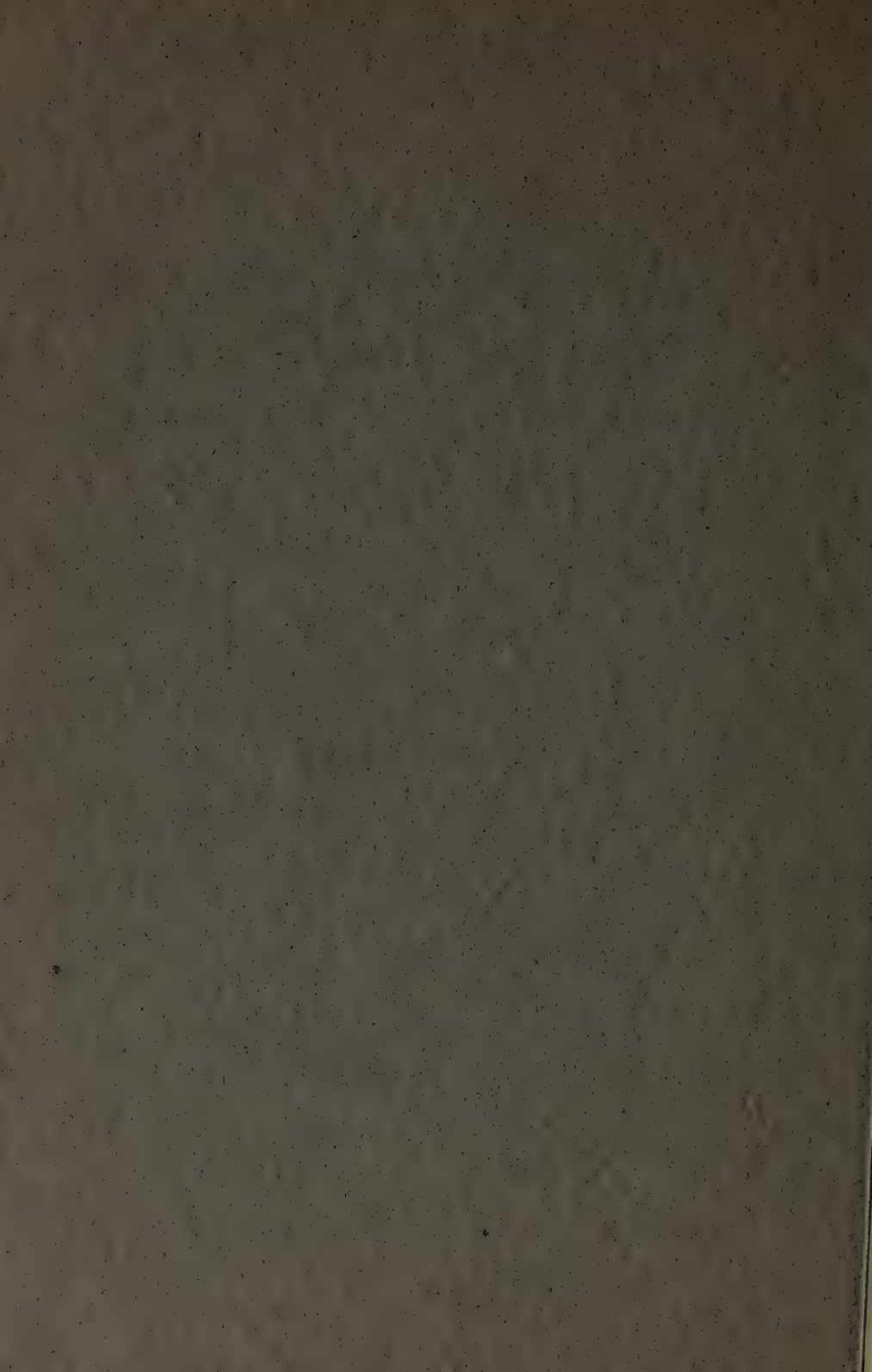
WASHINGTON : GOVERNMENT PRINTING OFFICE : 1917

Filed

AUG 10 1917

F. D. Monckton,

Clerk.



In the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellant,	} No. 2894.
v.	
GRAND CANYON CATTLE COMPANY, a corporation.	

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a suit by the United States to cancel four patents issued under the mining laws to one B. F. Saunders for four mining claims and a mill site in the State of Arizona.

At the time these patents were issued, and for a number of years prior thereto, Saunders was engaged in the cattle business, maintaining several ranches (R. 35). One of these ranches was known as the Buckskin Mountain or V. T. Ranch (R. 38), and it is upon this ranch that the lands involved are located.

A plat of the ranch will be found in the record on page 567, and a diagram showing the Kaibab National

Forest and the location of the lands with respect thereto will be found on page 522. One of the patented tracts, known as Jacobs Lode claim is within the limits of the forest, while the other claims adjoin the forest on the east. This diagram shows that the patented lands in question, and in addition thereto a number of unpatented mining claims, are all located upon, or immediately adjoining, springs, lakes or water holes.

The bill alleged that the evidence offered by Saunders which induced the officials of the Land Department to issue the patents in question was false in that the lands involved were not mineral lands either at the time of the filing of the applications to purchase or at any other time; that there had been no discovery of mineral upon any of the mining claims; that the mill site was not occupied and used for mining purposes for the storage of ore from the mining claims, as contemplated by the law; that Saunders had made no mining improvements whatever upon the lands but such work as had been performed thereon had been done for the purpose of developing the water supply and it was for that purpose alone that any improvement had been made (R. 39).

At the time that the bill was filed, 1912, the land had been sold to the Grand Canyon Cattle Company, which company, and one Ora Haley, who was in partnership with Saunders when the patents were procured, were made defendants. Saunders having died and Haley having parted with his interest to the company, the latter alone defended the suit. The answer disclaimed knowledge on the part of the de-

fendant as to whether or not the proof offered by Saunders in support of the mining claims was false but admitted that the patents were issued as specified in the bill; admitted the purchase from Saunders in 1907, but denied that the company had at the time of its contract of purchase any knowledge or information whatever of the illegal methods or proceedings by which the title to the lands had been acquired. The company claimed that it had purchased the lands for valuable consideration in good faith and that it took the title relying upon the patents that had been issued by the government (R. 459).

A great deal of evidence was offered by the government showing that the lands in question were not mineral lands; that no mineral had ever been discovered thereon; that the development work, so-called, was done solely for the purpose of developing the water holes and springs which the lands contained; that Saunders was in the cattle business and so was the purchaser, the Grand Canyon Cattle Company, and the sole and only use ever made of the lands, either the mining claims or the mill site, was for the purpose of watering cattle and maintaining corrals. Some evidence was also offered intended to show that the officers of the defendant company had knowledge of the illegality of the claims prior to their purchase from Saunders.

The defendant offered the testimony of one witness only—E. J. Marshall, the President of the company, who admitted that the land had been bought for the purpose of operating it as a cattle and stock ranch,

but denied that he or any officer of his company had knowledge of the fraud by which the titles were procured from the government.

In a memorandum opinion filed at the time of the entry of the decree dismissing the bill, the District Judge stated that he had no difficulty in finding that Saunders was guilty of at least legal fraud and that if it were an action solely between the government and Saunders, a decree would be entered in behalf of the former. Upon the other question presented, however, whether the Grand Canyon Cattle Company was a *bona fide* purchaser for value, the Judge said:

I am of the opinion that there is an utter failure to establish such allegations, and I find that said Grand Canyon Cattle Company at no time prior to the date of the delivery of the deed and the payment of the consideration, which was *bona fide*, had any actual knowledge or notice of the alleged fraud or illegal methods of Saunders, or of facts sufficient to put it on inquiry, and that the defense of a *bona fide* purchaser for value without notice has been fully met and proved. (R. 465.)

The government's appeal brings the case before this court.

ASSIGNMENT OF ERROR.

The error upon which we rely is found in the 53d assignment, and may be substantially stated as follows:

The District Court erred in holding that the defendant company was a *bona fide* purchaser without notice.

ARGUMENT.

The defense of bona fide purchaser is an affirmative defense which must be set up and proved, and it has not been established in this case.

(a) *The defense of bona fide purchaser must be set up and proved.*

It has been so clearly settled by the Supreme Court that the defense of *bona fide* purchase is an affirmative defense which must be specifically set up and established, that any extended argument on this point is unnecessary.

A recent decision in which the rule is stated and reaffirmed is that of *Wright-Blodgett Company v. United States*, 236 U. S., 397, 403, where in speaking of this defense the court said:

But this is an affirmative defense which the grantee must establish in order to defeat the Government's right to the cancellation of the conveyance which fraud alone is shown to have induced. The rule as to this defense is thus stated in *Boone v. Chiles*, 10 Pet. 177, 211, 212: "In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea

show how the grantor acquired title. * * *
 The title purchased must be apparently perfect,
 good at law, a vested estate in fee-simple.
 * * * It must be by a regular conveyance;
 for the purchaser of an equitable title holds
 it subject to the equities upon it in the hands
 of the vendor, and has no better standing in a
 court of equity. * * * Such is the case
 which must be stated to give a defendant the
 benefit of an answer or plea of an innocent
 purchase without notice; the case stated must
 be made out, evidence will not be permitted
 to be given of any other matter not set out."

(b) *The defense of bona fide purchase has not been established.*

Tested by the rule announced by the Supreme Court in the case cited, it will be readily seen how far short the defendant fell in this case.

The rule requires that "The consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed." In this connection the answer merely alleges that the company purchased the lands from Saunders—

for a valuable consideration, in good faith, without any knowledge or notice whatever of any fraudulent, irregular or improper means by which the title to said premises had been obtained by said B. F. Saunders, if any such improper, irregular or fraudulent means for said purpose had been employed by said B. F. Saunders; that it took the title to said premises from said B. F. Saunders relying upon the record title thereto as exhibited and shown to it by the

record of the patents from the plaintiff, the United States, to the said B. F. Saunders, and not otherwise. (R. 459.)

A statement as to what the consideration was is entirely wanting; nor is this defect in the answer in any manner supplied by the evidence, as we shall undertake to show.

However, assuming that the defense was sufficiently set up in the answer, all the evidence to support it must be found in the testimony of Mr. Marshall, the company's president, as he was the only witness offered by the defendant. We shall accordingly review his testimony.

He first visited the ranch in June, 1907, but prior to that time had had some negotiations with Saunders looking to a possible purchase of the property (R. 307). He inspected a number of places on the ranch for the purpose of examining the water supply (R. 308), and among those places was the Jacobs Lode, located at Jacobs Lake—one of the patented tracts (R. 309). He had a map of the place and discussed the titles with Mr. Clark, who was Saunders' agent and conducted witness over the premises (R. 309-310).

Mr. Marshall again visited the ranch in September, 1907, but as a result of his two trips there he—

got no impression at all of these patented mining claims as to their mineral features. My examination of those lands was not with any reference to mineral. There was no statement made to me by anybody with respect to their mineral character or in respect to their development. (R. 313.)

The contract for the purchase was signed July 30, 1907, at which time Marshall paid Saunders \$15,000 (R. 312). This contract will be found in the record beginning at page 433; it shows that the property to be transferred consisted of two ranches, appertaining to which there were lands, waters, easements, tenements and hereditaments, including six 40-acre tracts located with forest reserve scrip, 5 patented mineral claims constituting the claims in question, 4 unpatented mineral claims, 2 desert land claims containing 360 acres intended to be used as a reservoir site; also houses, corrals, fences, wagons, farming implements, harnesses, and more than 24 miles of pipe line used for carrying water; between twelve and fourteen thousand head of stock cattle, 175 saddle horses, pack mules and pack horses, and also shares of the stock of a corporation engaged in the business of buffalo raising, having a par value of at least \$4,000.

The price agreed upon for the ranch was \$50,000, with \$16 a head for cattle, and \$20 a head for the horses. According to the testimony of Mr. Marshall, the plant consisted of—

all the land owned, scrip, lands, water appropriations, pipe-lines, troughs, corrals, buildings, wagons, supplies, harness, saddles, and everything that went to make up the equipment, and everything that in any way pertains to what is known as the V. T. ranch. That went in as the plant for the sum of fifty thousand dollars; that includes all cabins, structures or houses that were located on owned property, or whatever Saunders' rights were to property on the Forest

Reserve. In other words, my understanding was that it included any property that Mr. Saunders claimed through either legal or equitable right or through possession. (R. 330-31.)

It will thus be seen that so far as the record shows the consideration actually paid for the patented lands may have been negligible, as those tracts contained but 71.55 acres and comprised only a small part of the area purchased. Indeed, Marshall admitted that he did not attach much importance to the unpatented claims or *ownership of anything* on the Forest Reserve; for the reason that unless his company had grazing permits from the Bureau of Forestry it would have no rights on the Forest Reserve, "whether we owned them or not" (R. 336-337).

The \$15,000 that was paid to Saunders was repaid to witness by the defendant cattle company (R. 314). Prior to the execution of the deeds, which took place early in December, 1907, witness consulted an attorney furnishing the latter the abstract of the title (R. 315). This abstract is in the record at pages 445 to 447, and clearly shows that title to the tracts involved was acquired under the mining laws, the names of the locations being given in full. Moreover, Mr. Marshall admitted that he knew the company was buying five patented mining claims. He had full information in regard to them. Saunders told him that there was water on the patented mining claims and witness would not have bought them unless he knew that was so (R. 326).

Witness asked his attorney, to whom the question of title was referred, whether a patent from the United

States on a mining claim was to be regarded in the same way as a patent to a homestead or desert claim, or are all United States patents on the same plain. The attorney's answer to that question was "yes" (R. 331). But witness did not know that his attorney had made any visit to inspect the claims. Witness knew of no facts to lay before the attorney except that the lands had been pointed out as United States patented mining claims. He did not inform his attorney as to the improvements on them, which consisted solely of stock, corrals, houses, etc. (R. 331).

Saunders was not a miner but was a cattleman engaged in the business of raising cattle. That was clearly known to Mr. Marshall who desired the lands for the same purpose. He knew that the so-called mining claims contained water. He knew they had been used for the purpose of furnishing water for the stock and cattle upon the ranch and he wanted them for the same purpose himself. He also knew that such title as Saunders had had been obtained under the mining laws. That fact had been pointed out to him particularly. Moreover, it was clearly disclosed by the abstract of title that was furnished him and he would therefore have been charged with notice even though his attention had not been specifically invited to the matter. *Washington Securities Co. v. United States*, 234 U. S., 76.

The obligations resting upon the intending purchaser of real estate are clearly defined by the Supreme Court in the case of *Simmons Creek Coal Co. v. Doran*, 142 U. S., 417, 437, where the court quotes approvingly

the rule stated by the Virginia Court of Appeals in *Burwell's Adm'rs v. Fauber*, 21 Gratt., 446, 463:

Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual*, but also by *constructive* notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice.

No elaborate argument is necessary to show that Mr. Marshall did not meet the obligation resting upon him in this case. He knew that some of the lands he was buying had been acquired as mining claims. He knew that they contained water holes; that they had been used for that purpose and, so far as he knew, for no other purpose. True, he asked his attorney whether a patent under a mining claim was to be regarded in the same light as a patent under any other public land law and was told that it was, but he admits that he did not tell his attorney the uses to which the lands had been put; neither did he say anything about the character of the improvements that had been made thereon. The record shows beyond question that no mineral was ever taken from any of the mining claims,

or, indeed, that any mineral was ever discovered therein. Mr. Marshall must therefore have been blind indeed not to see that the patents had been improperly obtained from the government.

Moreover, as already indicated, the defendant failed to show that it paid any consideration whatever for the lands involved in this suit. True, it paid \$50,000 for the entire plant, of which these claims constituted but a very small part, and it is quite possible that the purchase would have been made for substantially the same price, whether the title to the water holes in question was considered good or not; in fact Mr. Marshall expressly stated that it made little or no difference whether the company owned or did not own anything on the Forest Reserve, and one of these claims is within the limits of the Forest.

The District Judge erroneously assumed that the burden was upon the government to show that the purchase was made with notice of the fraud by which the titles were acquired and thus entirely ignored the obligations resting upon an intending purchaser; otherwise he could never have reached the conclusion upon which his judgment was based.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court was erroneous and should be reversed.

S. W. WILLIAMS,

Special Assistant to the Attorney General.

AUGUST, 1917.



United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

Grand Canyon Cattle Company,
a Corporation;

Respondent.

Filed

SEP 11 1904

F. D. Monckton,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA.

BRIEF OF RESPONDENT.

O'MELVENY, MILLIKIN & TULLER,
HENRY J. STEVENS,
Solicitors for Respondent.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,	}
<i>Appellant,</i>	
<i>vs.</i>	
Grand Canyon Cattle Company, a Corporation,	
<i>Respondent.</i>	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA.

BRIEF OF RESPONDENT.

The only point relied upon by the appellant in this case in support of its appeal is that set out in the 53rd assignment of error, which, according to the statement of counsel for appellant on page four of his brief, is substantially stated as follows: "The District Court erred in holding that the defendant company was a *bona fide* purchaser without notice." We understand the rule to be that all other assignments of error set out in the record are to be considered as having been abandoned or waived.

STATEMENT OF FACTS.

A somewhat fuller statement of the facts of the transaction which resulted in the purchase by the respondent, Grand Canyon Cattle Company, of the lands in controversy than is set forth in appellant's brief, will conduce, we believe, to a better understanding of the case and of our argument in support of the decree of the lower court.

It appears from the uncontradicted testimony of Mr. E. J. Marshall that until the year 1889 he had engaged principally in the railroad, banking and ranching business in the state of Texas. In 1889 he came to California and engaged in banking, ranching and farming. That he has never been engaged in mining and has had no acquaintance with mineral-bearing lands as such [R. 307]. That his attention was called to the "V. T. Ranch," in Arizona, where the claims in controversy are located, by reason of having received steers from there for his Chino ranch, in California, for the purpose of fattening. This was about the year 1906 or prior thereto. On account of the character of the cattle thus received he became interested in the property and made inquiry about the same. [R. 311, 312, 321.] As a result of these things Mr. Marshall ascertained that Saunders was the owner of the property but that it was not for sale. In the late winter of 1906 or spring of 1907 Mr. Marshall was at Salt Lake (his residence at all times being at Los Angeles), and he then met Mr. Saunders and stated to him that he was desirous of getting a ranch for breeding purposes. Saunders referred him to a property in Nevada

owned by another party, but no negotiations were had respecting the V. T. Ranch, as Mr. Saunders did not desire at that time to sell the same. [R. 312, 321.] At a later date, and in 1907, Mr. Saunders notified Mr. Marshall that on account of ill health he was willing to sell the ranch. Thereupon an arrangement was made which resulted in Mr. Marshall going to the ranch to look over the same. [R. 322.] This trip to the ranch was made in June, 1907. [R. 307.] On that occasion Mr. Marshall drove over the ranch, staying at the Jacobs Lake claim over night. *He did not go into any of the tunnels or excavations nor examine the character of the ground*, as he had no interest therein as a mining proposition. The next day following the night spent at Jacobs Lake he left and went over other parts of the ranch, *but did not get nearer any of the other patented claims in controversy in this suit than from half a mile to a mile*. On page 309 of the record his testimony appears as follows, referring to the visit just mentioned,—“The only one of those claims we visited on this occasion was Jacobs Lake. I didn’t go to any of the others. The closest we went to any of the others I should say was a half a mile to a mile.”

Subsequently, in September, 1907, Mr. Marshall, in company with Mr. Isaac Millbank and Mr. Nicholas Millbank, friends of Mr. Marshall’s, visited the V. T. Ranch, but, as Mr. Marshall says: “The occasion of my going was more a pleasure trip than anything else * * * it was more like a camping trip.” On this occasion Mr. Marshall spent one night at Jacobs Lake, *but did not visit any of the mining claims*.

[R. 312, 313.] With respect to these visits he says: "My examination of those lands was not with reference to mineral. There was no statement made to me by anybody with respect to their mineral character or with respect to their development." [R. 313.] Between these two visits to the ranch of June and September, 1907, to-wit, on July 30, 1907, the contract for the purchase of the ranch by Mr. Marshall was executed. This contract is defendant's "Exhibit B." [R. 433.] By this contract Mr. Marshall agreed to purchase the ranch and cattle from Mr. Saunders, who agreed to sell the same for the following price: \$50,000 for the real property, fixtures and equipment, and \$16.00 per head for all the livestock. By a later arrangement the price for the horses on the ranch was fixed at \$20.00 per head. Besides the patented claims in question there were other unpatented claims which were included in the purchase, but it will be noted that the contract provides that the patented claims were to be conveyed by a warranty deed, whereas the other and unpatented claims were to be covered by a quitclaim deed. [R. 437.] The time of payment was as follows: \$15,000 on the signing of the agreement; \$100,000 upon the transfer of the property on or before November 1st, 1907; the balance upon the delivery of the stock on or before November 1st.

Upon the execution of this contract in July, 1907, Mr. Marshall paid the initial payment of \$15,000 to Mr. Saunders [R. 312], which sum was subsequently repaid to him by the Grand Canyon Cattle Company [R. 314.] As was contemplated by the contract, the respondent company was incorporated for the purpose

of taking over the property. The charter of the respondent company is dated October 4, 1907. [R. 408.] The organization of the company, however, was not effected until the latter part of October. On November 29, 1907, Mr. Marshall was elected president in place of Mr. Stevens, who had been elected president at the first meeting, only, however, as a nominal president for the purpose of effecting the organization, and Mr. Marshall has been president ever since. [R. 313-314.]

The contract of July 30, 1907, for the purchase of the ranch, was assigned to the Grand Canyon Cattle Company November 29th, 1907. Assignment shown by defendant's Exhibit C. [R. 444.]

Before the fulfillment of the contract it was modified somewhat as to the time of making the payments with the result that \$30,000 was paid December 5, 1907, when Mr. Marshall went to Salt Lake to close the matter up [R. 314, 315], and at the same time negotiable promissory notes were given by the Grand Canyon Cattle Company for the aggregate sum of \$65,150.00, one of which was paid a few days before maturity, the balance at maturity or a few days thereafter. The notes were all dated December 5, 1907, and were payable sixty days from date. [R. 316.] The balance of the purchase price, amounting to \$102,761.24, was represented by four notes of the company, secured by a mortgage on the real property dated December 5, 1907. These notes were payable in two years and were paid at or before maturity, the mortgage being released June 10, 1909. [R. 316, 402, 404.]

At the time of the payment of the \$30,000.00, December 5, 1907, a warranty deed covering the patented claims in controversy was executed by Mr. Saunders to the Grand Canyon Cattle Company as assignee of Mr. Marshall, and quitclaim deeds were made of the other properties, all as provided in the contract. [R. 314, Government's Exhibit 38-P; R. 400.]

It will be noted that while the deeds in question from Mr. Saunders to Grand Canyon Cattle Company were dated December 2nd, they were acknowledged December 5th, which would accord with the testimony of Mr. Marshall that the transaction was closed on December 5th.

It is proper, we think, at this time to invite the court's attention to the fact that Mr. Marshall testified that before closing this transaction at the time above stated, he took the advice of a lawyer who was a member of the firm of Pearce & Critchlow, attorneys at Salt Lake, respecting the title, and that Mr. Pearce was at that time the assistant secretary of the Interior. Mr. Critchlow advised Mr. Marshall in substance that the patents were valid and that he could rely on the same. [R. 315.]

The contract of purchase was witnessed by Mr. Pearce.

Mr. Marshall testified that the purchase price of the property described in the contract was a fair price therefor and showed by his experience that he was qualified to speak as an expert. [R. 319, 320.] Before the transaction was closed by the giving of the deeds and the payment of the purchase price and the giving

of the mortgage, Mr. Marshall was furnished with an abstract, which appears in the record. [R. 445 *et seq.*] Mr. Marshall testified that the first time he ever heard any claim of any fraud or irregularity with respect to the issuance of the patents sought to be set aside was when this suit was brought, which was May 5, 1912, that being the date when the bill was filed. [R. 15.] The patents sought to be set aside in this case were dated respectively as follows:

Sunset Mill Site and Sunset Mining Claim, June 9, 1906. [R. 355, 359.]

Jacobs Mining Claim, March 18, 1907. [R. 363, 367.]

Noon Day Mining Claim, June 22, 1907. [R. 370, 374.]

Emmet, October 20, 1906. [R. 377, 381.]

Such, in brief, is a fair and correct history of the acquisition of this property by the Grand Canyon Cattle Company, respondent herein, from which it appears that this property was purchased by the Grand Canyon Cattle Company and Mr. Marshall in the best of faith, without any notice whatsoever of the alleged fraud in the procurement of said patents, and that a fair price amounting to many thousands of dollars was paid therefor.

ARGUMENT.

It is claimed first by counsel for appellant that under the pleadings in this suit the defense of a *bona fide* purchaser could not legally be interposed at the trial. It may be true that the weight of authority is in favor

of the proposition that the defense of *bona fide* purchaser is one that must be affirmatively set up by a defendant relying thereon. But examination of the authorities will show that by no means is the rule universal. We contend, however, that even if such be the rule of pleading, we have complied therewith. The respondent herein affirmatively alleged all of the facts essential to show that it was a *bona fide* purchaser of the lands in controversy. It may be that this defense was not pleaded in absolutely correct form, nor with the particularity suggested in the case referred to by counsel in his brief, yet it must be conceded that there was a *bona fide* effort on the part of the respondent to plead this defense, and any objection as to the form thereof comes too late on this appeal. It should have been made either by a proper objection to the pleading in the court below and before the trial, or by an objection to any testimony in support of such defense when offered by the respondent at the trial. If this had been done and the court had deemed the objection well taken, undoubtedly permission to amend would have been granted, and the respondent, if it felt so advised, would have made the necessary amendment; for the facts as shown by this record would clearly have warranted it. Instead of any such course as this having been pursued, respondent, through its counsel, in the court below, proceeded with the trial of the case upon the theory and assumption that the issue had been properly raised and that evidence thereon was properly admissible. It will be noted that nowhere in the record is there a suggestion

that either the court or counsel for the appellant had any doubt as to this issue having been raised by the pleadings or that the appellant had any objection whatever to the trial of such issue. Counsel for appellant on this appeal in his statement of the issues raised by the pleadings, on pages 2 and 3, says: "The company claimed (by its answer) that it had purchased the lands for a valuable consideration in good faith and that it took the title relying upon the patents that had been issued by the government." He also states on page 3 that the *government offered evidence intended* "to show that the officers of the defendant company had knowledge of the illegality of the claims prior to their purchase from Saunders." It would seem that this affords conclusive evidence that all parties considered the issue of *bona fide* purchaser to have been fairly raised by the pleadings and that the case was tried upon that theory, both by the court and by counsel. On the same point we further invite the court's attention to the statement in the "Memorandum Opinion" of the Honorable Judge who presided at the trial of this case in the lower court, appearing on page 465 of the record, as follows: "Saunders, one of the respondents, died several years prior to the date of the filing of the suit. The Grand Canyon Cattle Company answered disclaiming all knowledge of the alleged fraud on the part of Saunders, *and setting up that it was a bona fide purchaser without notice*, for value, after the issuance by the government to Saunders of said patents." (Italics ours.) Certainly there can be no doubt as to how the court regarded the issues, and

there is nothing in the record to suggest in the slightest degree that the counsel for the government who tried the case had any different notion or understanding; on the contrary the record everywhere shows that they regarded the issue as squarely raised and proper to be tried, and, we might add, they did try it to the best of their ability, but as both the facts and the law were against them they lost and justice prevailed.

Even if this defense had not been affirmatively set up by respondent, we believe that the point relied upon by appellant cannot now be made on this appeal; for the reason among others that the appellant in its bill anticipated the defense of *bona fide* purchaser. In paragraph six of the original bill it is alleged as follows:

“The plaintiff further shows that on the 2d day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the lands described as ‘Jacob lode claim’ and ‘Emmett lode claim’ to the defendant corporation, The Grand Canyon Cattle Company, and on the 5th day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the land described as the ‘Noonday lode claim,’ the ‘Sunset lode claim’ and the ‘Sunset Millsite’ to the said defendant corporation, The Grand Canyon Cattle Company, which said company at the times of the execution of the said deeds and prior to any contract or agreement to purchase said lands or any part thereof from the said B. F. Saunders was fully notified and informed of the said illegal methods and proceedings by means of which the said G. F. Saunders had acquired plaintiff’s patents for said lands.” [R. p. 12.]

And in the amended bill, paragraph six, the defense is anticipated by even more complete allegations, thereby indicating in the clearest manner possible that appellant intended to raise the issue of *bona fide* purchaser and expected that it would be considered and determined at the trial. We quote from the amended bill, paragraph six, as follows:

“That plaintiff further shows that on the 2d day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the lands described as ‘Jacob lode claim’ and ‘Emmett lode claim’ to the defendant corporation, The Grand Canyon Cattle Company, and on the 5th day of December, 1907, the said B. F. Saunders executed a deed conveying the legal title to the land described as the ‘Noonday lode claim,’ the ‘Sunset lode claim’ and the ‘Sunset Millsite’ to the said defendant corporation, The Grand Canyon Cattle Company, which said company, at the time of the execution of the said deeds, and prior to any contract or agreement to purchase said lands, or any part thereof, from the said B. F. Saunders, was fully notified and informed of the said illegal methods and proceedings, and at all times herein mentioned well knew said methods and proceedings to be false, fraudulent and untrue, and well knew said methods and proceedings were the means by and through which the said B. F. Saunders acquired plaintiff’s patents for said lands.” [R. p. 30.]

The allegations of the amended bill above quoted were all denied by the defendant’s answer, from which we quote as follows:

“Further answering the plaintiff’s amended complaint, this defendant says: That it admits that on, to-wit, the second day of December, 1907, the said B. F. Saunders executed a deed conveying the title to the lands described in said plaintiff’s amended bill of complaint as ‘Jacob Lode Claim’ and ‘Emmett Lode Claim,’ to this defendant, the Grand Canyon Cattle Company, and admits that on, to-wit, the 5th day of December, 1907, the said B. F. Saunders executed a deed conveying the title to the land described in said amended bill of complaint as the ‘Noonday Lode Claim,’ the ‘Sunset Lode Claim’ and the ‘Sunset Mill Site’ to this defendant, the Grand Canyon Cattle Company. But this defendant specifically denies that at the time of the execution of said deeds and prior to any contract or agreement to purchase said lands or any part thereof from said B. F. Saunders, or at any time or in any manner whatever, it was notified and informed of the said illegal methods and proceedings or any illegal methods and proceedings by means of which the said B. F. Saunders had acquired plaintiff’s patents for said lands, and denies that at said times or at any time this defendant knew of any false or fraudulent methods and proceedings were or had been adopted or practiced by the said B. F. Saunders for the purpose of acquiring the title to said lands from said plaintiff.” [R. pp. 458-459.]

Following these denials are the affirmative allegations which substantially set out that respondent was a *bona fide* purchaser for a valuable consideration without notice or knowledge of the alleged fraudulent acts of Saunders in the procurement of the patent.

The object of pleadings is to define the issues so that the parties and the court may understand the questions that are raised and which are to be decided. Certainly, in view of the allegations contained in the bill above referred to and the denials thereof in the answer, together with the affirmative matter set up, it cannot in good faith be claimed that complainant was in any way misled or that it did not clearly understand that the issue of *bona fide* purchaser was to be tried and determined.

Where a defense is thus anticipated by allegations in the bill a complainant is in no position, particularly on an appeal, to claim that the affirmative defense was defectively pleaded. We quote from *Verner v. Verner*, 1 So. Rep. (Miss.) 53, as follows:

"By her bill the complainant anticipated and negatived the defense which she expected the grantee to interpose, viz., that he was a *bona fide* purchaser for value. By his answer, which is responsive to the allegations of the bill, he replies that he purchased in good faith the lands conveyed to him and paid full value therefor. In this condition of the pleadings the burden was devolved on the complainant of establishing the allegations of her bill thus responded to by the grantee."

Jenkins v. Pye, 12 Peters 241, 252; and see first paragraph of syllabus

The cast last cited is referred to by Professor Street in his work "Federal Equity Practice, Vol. 1, section 745, in support of the rule stated by him, as follows:

"§745. Qualification of General Rule.

"The rule that disables a party defendant from

offering proof of a specific defense not specially pleaded by him is limited to matters of affirmative defense in avoidance of the case stated in the bill. It does not apply where the matter offered in proof by the defendant controverts a statement contained in the bill, which statement is denied in the answer. If a bill makes a specific allegation, which allegation is at the basis of the equity of the suit, and the answer contains a sufficient denial of such allegation, the defendant can offer evidence at the hearing in disproof of such allegation of the bill, though his answer has not specifically set forth the facts constituting this matter of defense. It should be remembered that all that is ever necessary to make proof admissible is that the facts to which the proof is directed should be properly in issue; and it is enough that the specific allegation should be found in the bill and denied by the answer.

“*Jenkins v. Pye* (1838), 12 Pet. 241, 9 L. Ed. 1070: A bill to set aside a deed alleged that it was wholly without consideration, though a nominal consideration was recited. The answer denied the allegations of the bill. The defendant put in evidence the fact of the payment of two thousand dollars, or its equivalent, as a consideration. The court held that this proof was admissible without any allegation in the answer that such a consideration was paid. It rebutted the allegation in the bill that the deed was without consideration.”

As showing that the appellant was in nowise misled by what counsel claims to be the defective character of respondent's answer or plea, but on the contrary that its attorneys fully understood that the issue had been raised and was to be tried, we again call attention to

the statement on page three of appellants' brief to the effect that *appellant* offered evidence "intended to show that the officers of the defendant had knowledge of the illegality of the claims prior to their purchase from Saunders." Also to the statement on the same page that "the company claimed that it had purchased the lands for valuable consideration in good faith." From the statement last quoted it would seem that counsel who wrote the brief on this appeal likewise had no difficulty in determining that the issue of *bona fide* purchaser was raised by the respondent's answer, to say nothing of the allegations in appellant's own bill, whereby the defense was clearly anticipated.

When counsel says that the respondent claimed it was a *bona fide* purchaser, undoubtedly he had reference to the claim thus made in the affirmative matter set up in the answer.

An objection to the sufficiency of an answer or plea cannot be first raised on appeal, after the case has been tried on the merits, and evidence introduced in support of the defense made by such an answer, without objection.

We quote from the opinion of Justice Brewer in the case of *Smith & Davis Mfg. Co. v. Mellon*, 58 Fed. 705, 706, as follows:

"This case is before us on an appeal from a decree of the Circuit Court of the United States for the eastern district of Missouri, dismissing the plaintiff's bill. The suit was one for the infringement of a patent, that patent being No. 269,242, dated December 19, 1882, issued to John G. Smith, and by him assigned to complainant, and was for

an improvement in spring beds. The ground on which the Circuit Court dismissed the bill was that the invention covered by the patent had been in public use and on sale for more than two years prior to the date of the application, and that for this reason the patent was void. 52 Fed. 149. Counsel for the appellant insists that this defense was not properly presented by the pleadings, and, therefore, that all testimony tending to support it should be ignored; further, that the only use disclosed by the testimony was an experimental one, and therefore not such as to avoid the patent; and, finally, that the precise invention for which the patent was obtained was not in use or on sale prior to the application for the patent.

“With reference to the first of these propositions but a word is necessary. The statute (Rev. St., §4920, cl. 5) provides for, among other special defenses to a suit for infringement, this: that the invention has ‘been in use or on sale in this country for more than two years before his application for a patent.’ The answer set up ‘that the alleged invention was in public and common use, and on sale, with and by the knowledge and consent of the patentee, for more than two years before the application.’ It did not in terms allege that such public use was ‘in this country,’ as the statute provides. While this defense may not have been pleaded with technical accuracy yet the testimony tending to establish it was received on the final hearing without any objection. *The first time the question has been raised, as appears from the record, is on the argument of the appeal in this court; and here it is too late.* Roemer v. Simon, 95 U. S. 214, 220; Loom v. Higgins, 105 U. S. 580, 595.” (Italics ours.)

In the case of Ogden Building & Loan Association v. Mensch, 63 N. E. (Ill.) 749, the court, in its opinion, says:

“If the appellant regarded the averments of the answer as but a mere legal conclusion, and insufficient to warrant the introduction of evidence, it should have filed exceptions to the answer, or, on the hearing before the master, should have objected to the admission of the evidence tendered for the purpose of proving facts upon which rested that which the appellant regarded as but a mere legal conclusion. Again, opportunity to prefer that objection was offered on the coming in of the master’s report. Had any such timely objection been made by the appellant association, the objection might have been obviated by an amendment of the answer. Having tried the case precisely as if the defense was that the notary public was disqualified to take the acknowledgment, and that for that reason the acknowledgment was void, had been formally and technically pleaded, the appellant association cannot be permitted to shift its position, and urge in this court, for the first time, objections which might have been obviated had they been preferred in the trial court. *Improvement Co. v. Whitehead*, 128 Ill. 279, 21 N. E. 569; *Brainerd v. Hudson*, 103 Ill. 218; *Gehrke v. Gehrke*, 190 Ill. 166, 60 N. E. 59; *Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627.”

In the case of *Perego v. Dodge*, 163 U. S. 160, 164, where it was claimed on appeal that affirmative relief was improperly awarded because no cross-complaint was filed, the Supreme Court of the United States, speaking through Chief Justice Fuller, said:

“Nor did the Supreme Court of the United States err in overruling the contention that affirmative relief was improperly awarded defendants because they had filed no cross-complaint. Such relief was sought by the answer which was treated by the parties and proceeded on by the court as equivalent to a cross pleading. The objection came too late in the appellate tribunal. Coburn Cedar Valley Land Co., 138 U. S. 196, 221.”

In *Planing Machinery Co. v. Keither*, 101 U. S. 479, 492, the question of the right to raise for the first time on appeal the sufficiency of an answer was considered by the Supreme Court of Iowa.

Willson v. Harris et al., 27 N. W. (Ia.) 374, 375;

Beacham v. Gurney, 60 N. W. (Ia.) 187.

We quote from the opinion of the United States Supreme Court in *Loom Co. v. Higgins*, 105 U. S. 595, 596, as follows:

“The appellants’ counsel has raised the question whether the defense of prior invention can be set up under the answer, which does not state it in the manner required by the statute. It denies, generally, it is true, that Webster was the original and first inventor of the improvement claimed in the patent; and specifies certain letters-patent issued in this country and in England in which it is alleged that the said invention, or material and substantial parts thereof, was described before any invention made by Webster, which is sufficient foundation for adducing such patents in evidence; but it does not give the name and residence of any person alleged to have invented the thing patented

prior to Webster; it only states that it was used and known to Davis. It is possible that this objection to the evidence would have been available if it had been taken in season. But we are not referred to anything to show that it was taken in the court below, or before the examiner when the witnesses were examined. In *Roemer v. Simon* (95 U. S. 214, 220) we held that the failure to interpose such objection before the final hearing is a waiver of the required notice in an equity suit."

We quote from the opinion of Judge Hawley delivering the opinion of this honorable court in the case of *Great Northern Ry. Co. v. McLaughlin*, 70 Fed. 671, as follows:

"1. It is contended that the complaint does not state facts sufficient to constitute a cause of action. This contention, in our opinion, is not well taken. It does not affirmatively appear from the allegations of the complaint that the injury of which McLaughlin complains was caused by the negligence of his fellow servants. The complaint avers that the injury was caused by the gross negligence of the railway company in the selection and use of improper skids by its superintendent and agent in loading steel rails upon its cars. It is subject to criticism, and is, perhaps, somewhat ambiguous and uncertain. It, however, states a cause of action, imperfect in some respects; but, inasmuch as no ruling was ever called for upon the demurrer filed thereto, the railway company cannot urge any objections to such defects for the first time in the appellate court."

It is true that some of the cases to which we have referred, as for instance, the one last cited, were law

actions, but we do not perceive any good reason why the principle involved should not control in a suit in equity as well as in an action at law, and that our contention in this behalf is correct, is shown by the ruling in a number of equity cases to which we call attention herein.

It will be noted that in the cases cited it was deemed sufficient to invoke the rule that the objection would not be considered on appeal, where no objection was made below, either to the evidence or to the pleading; but the case at bar presents a stronger reason for the application of the rule, since here, not only was there no objection made to the pleading or to the introduction of any testimony offered in support thereof, but the complainant, the appellant herein, voluntarily and as a part of its case, anticipated such defense and offered testimony for the purpose of refuting the same. True, such testimony was of no weight, as is impliedly confessed by the counsel for appellant on this appeal, since none of the testimony offered by appellant is referred to in its brief; nevertheless, the attempt to make the proof is sufficient to invoke the rule upon which we rely.

A replication was filed in this case by appellant. [R. p. 461.]

In the case of *Bean v. Clark*, 30 Fed. 225 (Cir. Ct. N. Y.), the court says:

“The plea of the defendants goes to the whole bill. The complainant has taken issue upon the plea, and the case is now here upon the proofs. The only inquiry is whether the proofs establish the facts alleged in the bill. If they do, the de-

fendants are entitled to judgment upon the plea, even though, had the plea been set down for argument, the facts averred would not authorize a judgment. Having taken issue upon the plea, the complainant cannot now assert that the facts alleged are not a good defense to the bill. Story, Eq. Pl. 697; Rhode Island v. Massachusetts, 14 Pet. 210; Myers v. Dorr, 13 Blatchf. 22; Bogardus v. Trinity Church, 4 Paige 178; Birdseye v. Heilner, 26 Fed. Rep. 147.”

Even admitting, for the purpose of argument, that the matter quoted in appellant’s brief from Wright Blodgett Company v. United States, states the law in respect to the manner of pleading the defense in question, yet it is by no means controlling in the case at bar, first, for the reasons already given that an objection to a defective answer or plea cannot be made for the first time on appeal, as shown by us—and second, because in the case at bar we are not dealing with a decree *in favor* of the complainant founded upon a finding that the defendant was *not* a *bona fide* purchaser, which was the fact in the case referred to in appellant’s brief. The case cited by the counsel is based upon language found in the opinion in the case of Boone v. Chiles, which enunciates a rule of pleading considered proper under the old practice where an answer served both as a pleading and as evidence.

Unlike the case relied upon by counsel when the court below found that defendant was not a *bona fide* purchaser, the court, in the case at bar, tried the case on the merits upon pleadings which it and the appellant deemed sufficient to raise the defense of *bona fide*

purchaser, and it found that the defendant was such a purchaser; plaintiff's objection comes entirely too late, even admitting that it would ever have had any validity whatever.

In the case of *Lowden v. Wilson*, 84 N. E. 245 (Ill.), where a bill was filed by a person claiming to be a *bona fide* purchaser to set aside a quitclaim deed as a cloud upon his title, the point was made that the bill should have alleged that the consideration "was *bona fide* and truly paid independently of the recital in the deed." The court, in passing upon this question, said:

"Plaintiff in error insists that the bill in cases of this kind must state, among other things, the consideration, with the distinct averment that 'it was *bona fide* and truly paid, independently of the recital in the deed,' and that this bill failing to do so, is fatally defective, citing in support of this contention, *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *Moshier v. Know College*, 32 Ill. 155; *Keys v. Test*, 33 Ill. 316; *Boone v. Chiles*, 10 Pet. (U. S.) 177, 9 L. Ed. 388; *Johnson v. Georgia Loan & Trust Co.*, 141 Fed. 593, 72 C. C. A. 639, and other cases of the same import. Plaintiff in error is not in position to raise the point. The defect, if any, is simply in the form of the pleading, and if not taken advantage of by demurrer, it is waived. 1 *Daniell's Ch. Pl. & Pr.* (6th Am. Ed.), p. 582; *Dupuy v. Gibson*, 36 Ill. 197; *Fisher v. Stone*, 3 Scam. 68; *Judson v. Stephens*, 75 Ill. 255. Had the objection been made on the hearing, the defect, if any, could have been obviated by amendment. *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Holman v. Gill*, 107 Ill. 467. Neither the

answer nor cross-bill of plaintiff in error raises this question of pleading but they join issue and deny consideration of any kind was paid by defendant in error to the vendor."

Also:

"The title of a subsequent purchaser whose deed is first recorded will not be defeated on the ground of notice of a prior unrecorded deed, 'unless the proof of such notice is so clear and positive as to leave no reasonable doubt that the taking of the second conveyance was, under the circumstances, an act of bad faith towards the first purchaser. The fact of notice must be proved by direct evidence or by other facts from which it may be clearly inferred, and the inference must not be probable, but necessary and unquestionable.' *Robertson v. Wheeler*, 162 Ill. 566, 44 N. E. 870. Mere suspicion will not raise an inference that such purchaser had notice. *Rogers v. Wiley*, 14 Ill. 65, 56 Am. Dec. 491; *Grundies v. Reid*, 107 Ill. 304. There are circumstances in this record sufficient to raise a suspicion that defendant in error had notice, but we cannot say from this evidence that it is so clear and positive as to show, beyond a reasonable doubt, that the defendant in error purchased this property in bad faith or had actual or constructive notice of the deed to plaintiff in error, either directly or through her authorized agent, at the time the deed to herself was executed."

While the ruling in that case involved the allegations in a bill, we see no reason why the principle is not applicable to an answer.

The Record Shows Conclusively That Defendant Was a Bona Fide Purchaser.

In support of his contention that the evidence did not show that the defendant was a *bona fide* purchaser, counsel for appellant in his brief on this appeal does not call the court's attention to any evidence whatsoever except that of Mr. E. J. Marshall. His whole argument as to notice of alleged fraud in the procurement of the patents is based upon the proposition that because E. J. Marshall on two occasions went upon the V. T. Ranch and stayed over night at Jacobs Lake, the location of one of the claims in question, he will be presumed to know not only that there was no mineral in these claims but also that the patents had been procured by fraudulent representations. The contention thus made seems to us almost too absurd to merit serious consideration.

In the first place it would seem possible that counsel is laboring under the erroneous impression or belief that at all times and under all circumstances the burden of proving a want of notice is upon a defendant setting up the claim of *bona fide* purchaser. The authorities are somewhat at variance as to whether or not the burden of proving the defense of *bona fide* purchaser is on the defendant claiming it. It may be admitted for the moment, for the purposes of argument, that the weight of authority is in favor of putting the burden of proof of such defense upon the party setting it up. But the rule is well settled that where a party relying on such a defense *proves the payment of a valuable consideration, the burden of showing notice*

of fraud, either actual or implied, shifts to the party claiming such fraud.

In the case of *Barton v. Barton*, 75 Ala. 401, the court, considering this question, in its opinion says:

“The rule as to proof of *bona fide* purchase is, that the party pleading it must first make satisfactory proof of purchase and payment. This is affirmative, defensive matter, in the nature of confession and avoidance, and the burden of proving it rests on him who asserts it. *Ei incumbit probatio, qui dicit. This done, he need not go further, and prove he made such purchase and payment without notice. The burden here shifts,* and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof, that, before the payment, the purchaser had actual or constructive notice of the equity or lien asserted, or, of some fact or circumstance, sufficient to put him on inquiry, which, if followed up, would discover the equity or incumbrance. *Craft v. Russell*, 67 Ala. 9, which collects the authorities: *Taylor v. A & M. Asso.*, 68 Ala. 229; *Cresswell v. Jones*, *Ib.* 420.” (Italics ours.)

United States v. Cowart, 205 Fed. 316;

Jones v. Simpson, 116 U. S. 614;

Casey v. Leggett, 125 Cal. 670.

Ross v. Wellman, 102 Cal. 4. In this case the Supreme Court of California, speaking through Commissioner Temple, said:

“It is said in *Jones v. Simpson*, 116 U. S. 610, that it is incumbent upon the creditor attacking a sale on the ground that it was made to defraud creditors, first, to show fraudulent intent in the vendor, that the burden is then on the purchaser

to show valuable consideration, *which shown, the burden shifts*, and the creditor must show knowledge of the fraudulent intent of the vendor on the part of the vendee." (Italics ours.)

Eams v. Crosier, 101 Cal. 262;

Hawke v. Calif. etc. Co., 152 Pac. 962;

Bell v. Pleasant, 145 Cal. 410, 104 Am. St. 68,
note;

Miller v. Fraley, 23 Ark. 735.

In Hart v. Church, 126 Cal. 480, the court (Justice Henshaw delivering opinion) said:

"Elton Church having shown that he took the note and mortgage before maturity and that he paid a valuable consideration therefor, it was incumbent upon the plaintiff to prove that he had knowledge of the fraud and of the fraudulent intent of the vendor in making the sale to him."

In United States v. Lamm, 149 Fed. 585, a demurrer was sustained to a bill by the government to set aside a patent on the ground that it did not charge that the defendant was not an innocent purchaser for value.

Gratz v. Land Company, 82 Fed. 385.

We quote from Miller v. Fraley *et al.*, 23 Ark. 746, as follows:

"The burthen of proving that appellees, or their attorney, had notice of the fraud was upon appellant, who charged the fraud, and sought thereby to destroy the legal title of appellee to the lands. The answer prepared and sworn to by the attorney, who made the purchase for appellees, and who is shown to have no interest in the matter,

denies most positively any knowledge or suspicion of the fraud, etc. He states as much in his deposition, and no witness contradicts him. How, then, can we say, upon principle, that he had notice. As said by Lord Hardwick in *Heinn v. Dood*, 2 Atk. 276, and repeated with approbation by Judge Story, in *Flag v. Man. et al.*, 2 Sum. 551, there ought to be *clear, undoubted notice, and suspicion of notice*, though a strong suspicion is not sufficient to justify the court in breaking in upon the legal rights of a purchaser."

We quote from opinion of Judge Ross in the case of *Wyrick et al. v. Frank A. Weck et al.*, 68 Cal. 10, as follows:

"It is said that the defense of a *bona fide* purchaser without notice is in the nature of new matter, the burden of proving which is upon the defendant. Ordinarily this is so. But here the plaintiffs allege that the defendants hold the legal title to the property, derived through the deed from Devenish, the patentee, and to charge them with the trust, expressly allege that at the time of their purchase they took with notice of the plaintiffs' equities. The proof on the part of plaintiffs was devoid of any fact tending to show notice on the part of defendants of plaintiffs' rights. There was nothing of record to put them on inquiry. The patent upon its face showed that the land was granted to Devenish, from whom defendants purchased, as is expressly charged in the complaint. *If there were matters in pais tending to show notice of plaintiffs' rights at the time of such purchase, as is also charged in the complaint, it was necessary for the plaintiffs to make the proof; for without such proof the title must re-*

main where plaintiffs have alleged it to be,—in defendants. (Code Civ. Proc., sec. 1891.)” (Italics ours.)

With respect to the case last cited it will be noted that the bill there, as in the case at bar, charged that the defendants “at the time of their purchase took notice of the plaintiffs’ equities.” (Italics ours.)

Defendant Paid a Valuable Consideration.

The evidence in this case, as is shown by our statement of the facts, conclusively shows that for the lands and cattle purchased by Mr. Marshall under the contract of July, 1907, there was paid the aggregate purchase price amounting to more than \$212,000.00. By the terms of the contract it was the understanding that \$50,000.00 should be considered as the price paid for the lands. Counsel for appellant in his brief makes the point that it is not definitely shown just what proportion of this \$50,000.00 was considered by the parties as applicable to the patented lands in controversy; but we submit that no such burden was cast upon the respondent. *The contract is the measure of the rights of the parties.* By the terms of that contract an indivisible price of \$50,000.00 was to be paid for all the patented lands and the unpatented claims. Manifestly it was impossible for Mr. Marshall, when testifying at the trial, or for anyone else, to segregate the price and show how much was paid for the patented claims. And it cannot be true that because of this condition of things respondent shall be deprived of its defense that it was

a *bona fide* purchaser. In order to be a *bona fide* purchaser, so far as consideration is concerned, it is necessary to show, with respect to the consideration, merely that it was a valuable one. It is not necessary to show that it was adequate. (Miller v. Fraley, 23 Ark. 736.) In this case, however, the testimony is uncontradicted that the consideration was adequate, or, as Mr. Marshall put it, the price paid for all the lands conveyed was a fair one. [R. 320.] If the price was fair for all the lands conveyed, necessarily it was fair for every part conveyed. The logic of this proposition seems to us indisputable, and the unexpressed value of any particular parcel, which may have been in the minds of either of the parties, in the course of their negotiations, is an entirely false quantity in the consideration of this case.

It is quite apparent from the record, however, though not important, that Mr. Marshall, in purchasing this property, and the Grand Canyon Cattle Company, as his assignee, considered that the patented claims were the really valuable parcels of the lands covered by the contract, and presumably for the very reason that these lands were patented and the title might be considered secure, whereas with respect to the unpatented claims the title must necessarily have been regarded as more or less precarious. As evidence of this we call attention to the fact that the contract of July 30, 1907, in express terms provided that warranty deeds should be given covering the patented claims, whereas only quit-claims were to be given with respect to the other in-

terests. Nothing could more clearly demonstrate the relative value in the minds of the contracting parties, particularly of Mr. Marshall, of the two classes of property. In other words, he regarded the patented claims of such relatively greater value that he insisted that he should be secured as to the title by warranty deed, whereas with respect to the others he was willing to take chances under a mere quitclaim. We do not see how it can honestly be contended, in the light of what the record discloses, that a very substantial value was not attributed by the purchaser to the patented claims and that a great portion, if not indeed all, of the \$50,000.00 was considered by the purchaser as in fact being paid for the patented claims.

Counsel seems to attach some value to the statement of Mr. Marshall that he "did not attach much importance to the unpatented claims or ownership of anything in the forest reserve." Mr. Marshall probably had in mind only unpatented claims, as indicated by his subsequent explanatory statement at the bottom of page 337 of the Record. Only one patented claim was in the reserve, the Jacobs lode (appellant's brief, page 2, and map referred to). But of what importance is the fact, even if it be admitted to be a fact, that Mr. Marshall did not consider the claims within the forest reserve of great value. He testifies he paid their value, whatever it was, and paid it in hard cold cash, and, by the way, during the panic of 1907, when large or even small sums of money were hard to raise; and in passing we might suggest that it is hardly within the realm of possibility that a man

of large business affairs, such as Mr. Marshall is shown by the record to be, would hardly at a time of such financial distress and peril, nor indeed at any time, have paid over \$50,000.00 for property the title to which he knew, or ought to have known, as appellant contends, had been fraudulently acquired by his vendor. Certainly in the light of all these facts it is folly to contend that a valuable consideration was not paid for these patented claims.

A Valuable Consideration Having Been Proved to Have Been Paid, the Burden of Showing Notice of the Alleged Fraud Rested Upon the Respondent, and This Notice, Under the Rule Laid Down by the Federal Courts, as Well as by the State Courts, Must Be Established by Clear and Convincing Proof Which Would stop Little Short of Proof Beyond a Reasonable Doubt.

Probably the leading case in the federal courts upon the question of the character of proof required to set aside a patent on the ground of fraud, is Maxwell Land Grant case, 121 U. S. 325. We quote from the opinion in that case (p. 381) as follows:

“We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of pri-

vate individuals, *how much more should it be observed* where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, *the immense importance and necessity of the stability of titles dependent upon these official instruments*, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; *but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.*" (Italics ours.)

In the case of Colorado Coal Co. v. United States, 123 U. S. 316, the court quotes with approval from the opinion in the Maxwell Land Grant case, and then says (p. 317):

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless

can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text:"

In *U. S. v. Stinson*, 197 U. S. 204, the court, speaking through Justice Brewer, calls attention to the fact that the stability of titles demands that United States patents shall not be set aside except upon the most clear and convincing evidence. We quote from the opinion:

"Second. The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, and presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' *Maxwell Land-Grant case*, *supra*, p. 381; *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 677; *United States v. Des Moines &c. Company*, *supra*, p. 541.

"Third. It is a good defense to an action to set aside a patent that the title has passed to a *bona fide* purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but also will protect the rights and interests of innocent parties. *United States v. Burlington & Missouri*

River Company, 98 U. S. 334, 342; Colorado Coal Company v. United States, *supra*, p. 313— a case in which, as here, suit was brought to set aside land patents on the ground that they had been obtained by fraud, and in which we said:

‘But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a *bona fide* purchaser for value without notice is perfect.’ ”

It will be noted that this is a case involving a defense of *bona fide* purchaser, and presumably the rule as to the quantum and character of proof applies to the question of notice as well as to the matter of fraud in the procurement of the patent; that such is the law we shall show by authorities hereafter cited.

A very thorough discussion of the law governing the setting aside of patents in suits by the United States is found in the opinion of Justice Brewer in the case of United States v. Detroit Lumber Company, 200 U. S. 321. We quote from page 331 as follows:

Also from page 333, as follows:

“We do not understand the law to be stated, or that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would

shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. *Jones v. Simpson*, 116 U. S. 609, 615. *He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title.*" (Italics ours.)

"‘A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, p. 622, where he says: “In *Ware v. Lord Egmont* the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it *but for his gross negligence in the conduct of the business in question*. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but

whether not obtaining was an act of gross or culpable negligence.”’” (*Italics ours.*)

Our contentions in this case, we believe, are fully sustained by this Honorable Court in the opinion rendered by Judge Ross in the case of *U. S. v. Clark*, 138 Fed. 295, wherein the rule is laid down that these patents are not to be set aside as against purchasers upon evidence amounting to mere suspicion, but only upon proof that produces conviction. The matter which we have quoted from *Maxwell Land-Grant* case is quoted in the opinion at length. See same case on appeal, 200 U. S. 601, 608. That mere suspicion, even though strong, does not amount to proof of notice in these cases, is also held by the Supreme Court of Arkansas in *Miller v. Fralley*, 23 Ark. 746.

We quote from *Reed v. Munn*, 148 Fed. 756:

“‘No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. *James v. Simpson*, 116 U. S. 609, 615, 6 Sup. Ct. 538, 29 L. Ed. 742. He is not bound to make a searching examination of all the account books of the vendor, nor to hunt for something to cast a suspicion upon the integrity of the title.
* * * The rule in respect to constructive notice was thus stated in *Wilson v. Wall*. (U. S.), 83, 90, 91, 18 L. Ed. 727: “A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair

consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, p. 622, where he says: 'In *Ware v. Lord Egmont* the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.' " And again in *Townsend v. Little*, 109 U. S. 504, 511, 3 Sup. Ct. 557, 561, 27 L. Ed. 1012: "Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. *Plumb v. Fluitt*, 2 Anst. 432; *Kennedy v. Green*, 3 My. & K. 699. * * * As said by Strong, J., in *Meehan v. Williams*, 48 Pa. 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. See, also, *Holmes v. Stout*, 3 Green Ch. 492; *McMechan v. Griffing*, 3 Pick. 149, 15 Am. Dec. 198; *Hanrick v. Thompson*, 9 Ala. 409." " "

To the same effect see *Wilson v. Wall*, 6 Wallace 83, 91, where the language of Chancellor Cranworth in *Ware v. Lord Egmont*, referred to in the opinion in the *Detroit* case, is quoted with approval.

That the rule as to the convincing character of the evidence applies to the question of notice is squarely held by the Supreme Court of California in *People v. Swift*, 96 Cal. 169. After quoting from the *Maxwell Land-Grant* case that part of the opinion that deals with the character of evidence, the Supreme Court of California, says:

“The foregoing rule of evidence not only applies to the matter of fraud practiced upon the Government by the entrymen or others in the actual procurement of the patent, *but applies with equal force and effect to the good faith and innocence of the subsequent grantee.*” (Italics ours.)

One of the reasons which might be assigned for making this rule as to character of proof in these cases applicable to the question of notice, is that a purchaser with notice becomes a party to the fraud. It is a case of *mala fides* and not *bona fides*, so that it may well be said that proof of notice is in reality proof of fraud on the part of the purchaser. This idea is borne out by the decision of the Supreme Court of Massachusetts, in the case of *McMechan v. Griffing*, 15 Am. Dec. 198, 3 Pick 149. We quote from the opinion on pages 200 and 201:

“In the case of *Le Neve v. Le Neve*, Lord Hardwicke says: ‘That the taking of a legal estate, after notice of a prior right, makes a person a

mala fide purchaser. This is a species of fraud, and *dolus malus* itself; for he knew that the first purchaser had the clear right to the estate, and after knowing that, he takes away the right to another person by getting the legal estate. And this exactly agrees with the definition of the civil law of *dolus malus*; Dig., lib. 4, tit. 3, lex. 2. Fraud, or *mala fides*, therefore, is the true ground on which the court is governed in cases of notice.' 3 Atk. 654."

Heine v. Dodd, 2 Atk. 275, also lays down the rule that "suspicion, even though it be a strong suspicion," is not sufficient to justify a court in finding that a purchaser had notice.

In the case of Lowden v. Wilson, 84 N. E. (Ill.) 245, the court, on page 248, says:

"The title of a subsequent purchaser whose deed is first recorded will not be defeated on the ground of notice of a prior unrecorded deed, 'unless the proof of such notice is so clear and positive as to leave no reasonable doubt that the taking of the second conveyance was, under the circumstances, an act of bad faith towards the first purchaser. The fact of notice must be proved by direct evidence or by other facts from which it may be clearly inferred, and the inference must not be probable, but necessary and unquestionable.' Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870. Mere suspicion will not raise an inference that such purchaser had notice. Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491; Grundies v. Reid, 107 Ill. 304. There are circumstances in this record sufficient to raise a suspicion that defendant in error had notice, *but we cannot say*

from this evidence that it is so clear and positive as to show, beyond a reasonable doubt, that the defendant in error purchased this property in bad faith or had actual or constructive notice of the deed to plaintiff in error, either directly or through her authorized agent, at the time the deed to herself was executed.” (Italics ours.)

Grundies v. Reid, 107 Ill. 310, where the court in its opinion (p. 311) says:

“But in McMechan v. Griffing, 3 Pick. 154, it was said, with reference to notice of an unregistered deed ‘The fact of notice must be proved by *indubitable evidence*,—either by direct evidence of the fact, or by proving other facts from which it may be clearly inferred. It is not, in such case, sufficient that the inference is probably,—it must be necessary and unquestionable.” (Italics ours.)

We believe we have conclusively established the following propositions of law: First, that even admitting, for the purpose of argument, that the defense of *bona fide* purchaser is an affirmative one which must be proven by defendant, nevertheless, when the defendant proves the payment of a valuable consideration the burden of proving notice to such purchaser shifts to the complainant; second, that proof of notice must be clear and indubitable and such as produces conviction in the mind of the court.

Such being the law which controls this case, we feel amply justified in asserting that the record utterly fails to show that the defendant Grand Canyon Cattle Company, or Mr. Marshall, had any notice

whatever of, or knowledge of, any fact or facts sufficient to put him or it upon inquiry with respect to the fraud claimed to have been practiced upon the Government by Saunders in the procurement of the patents. There was nothing to even excite suspicion of any such fraud.

As we have before observed in our statement of the facts of this case, the only testimony relied upon by the Government on this appeal to show notice is that of Mr. Marshall. Evidently counsel realized, as did everybody else connected with the case, including the court below, that the attempt to show notice by other witnesses was a complete failure and the Government on this appeal has been driven by dire necessity to claim that because Mr. Marshall drove over this ranch in a hurried fashion on two occasions, on neither of which did he examine these claims, or any of them, that he is charged with notice of the alleged fraud of Saunders. In the light of the rules laid down by the authorities to which we have invited the court's attention, as to character of proof required in cases of this kind, it seems almost a vain thing for us to analyze or review the evidence in order to point out its utter inadequacy to prove any notice whatever to Mr. Marshall or the respondent. It is not a case of conflicting evidence, it is not a case of interpreting the evidence. It is a case where there is *absolutely no evidence* of any notice whatever or knowledge sufficient to put upon inquiry, or even to excite suspicion. It is even more than that, the record in this case shows affirmatively, and without conflict, that neither Mr.

Marshall or the company had any notice or knowledge whatever of the alleged fraud.

The argument of counsel amounts to this and nothing more: That because Mr. Marshall knew that the patents covered mining claims and he did not see any mining operations carried on he was bound to make a full investigation, which, according to counsel's contentions, would have brought home to him sufficient knowledge of the alleged fraud of Saunders to charge him with notice.

If there is any one fact that the history of this country makes plain and certain, it is that there are literally thousands of mining claims which have been duly patented and which have never been worked as mines. And in many instances such claims are occupied and used by the owners for purposes other than mining.

Can it be said, when the United States has by its solemn act, and presumably after proper investigation by its duly appointed officers, issued its patent which in the eyes of the law is one of the highest muniments of title, that an intending purchaser of land covered by such patent is bound, in the first instance, to go behind the patent and investigate all of the antecedent facts and conditions? Most certainly not, for if the law were otherwise, a patent from the United States government, instead of being a substantial muniment of title, as it is meant to be, would be a delusion and a snare, and titles coming from the government, instead of being stable, as the courts declare they should be, would be uncertain and precarious to the last degree.

In the case of United States v. Cal. & Ore. Land Company, 148 U. S. 44, which involved the rights of persons claiming to be innocent purchasers, the court in its opinion, by Justice Brewer, says (p. 45):

“If a patent from the government be present, surely a purchaser from the patents is not derelict, and does not fail in such diligence and care as are required to make him a *bona fide* purchaser because he relies upon the determination made by the land officers of the government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested.”

As we have before stated, the record shows conclusively and without any contradiction whatsoever that the only claim Mr. Marshall ever visited was Jacob's Lode, where he stayed one night on the occasion of each of his two visits. He testified with respect to Jacob's Lode as follows:

“In looking over the improvements I didn't go into any tunnel or examine any shaft or examine the character of ground. I gave it no attention at all.” [R. 308.]

He further testified that “the only one of those claims we visited on this occasion was Jacob's Lake. I didn't go to any of the others. The closest we went to any of the others, I should say, was from a half a mile to a mile.” [R. 309.]

The foregoing testimony relates to the first visit to the ranch. As to the second visit he testified as follows:

“The occasion of my going was more a pleasure trip than anything else, and I took two guests with me, Mr. Isaac Millbank and Mr. Nicholas Millbank, his brother. It was more like a camping trip.” [R. 312.]

On page 313 of the record he states:

“I didn’t on that occasion visit any of these mining claims. As a result of my two visits to this property I got no impression at all of these patented mining claims as to their mineral features. My examination of those lands was not with any reference to minerals. There was no statement made to me by anybody with respect to their mineral character or with respect to their development.”

And there is not a scintilla of evidence in the testimony in any way derogatory to the perfect truthfulness of these statements. They stand as admitted facts in this case. How utterly flimsy, to make no harsher criticism, is the claim of the government in the brief filed herein, that under the circumstances which this record discloses there were facts brought to the attention of the purchaser sufficient to put him upon inquiry. We marvel that the government of the United States should continue to further prosecute this suit against this respondent or that counsel would have the temerity to assert to this court that the evidence in this record shows that this respondent, or Mr. Marshall, was not acting in good faith in the purchase of this property.

Counsel, impliedly at least, seems to make the point that because there may have been a lack of good mineral indications disclosed by the work done upon these

claims, this was sufficient to put a purchaser upon inquiry as to the alleged fraudulent acts of Saunders, notwithstanding the fact that the government deemed it necessary to employ the services of experts with their assays in its effort to establish its claim in court as to the non-mineral character of the claims.

Another fact which we say the history of this western country has definitely established is that there is nothing more unreliable than surface indications of ground as to whether it is mineral or non-mineral. It is a matter of common knowledge that frequently mines are uncovered where the surface indications gave no evidence that a mine would be found. On the other hand many a man has "gone broke" in developing a claim where the surface indications were of the finest and yet the mineral discovered in prospecting or developing work would not be sufficient, if the real conditions were known, to entitle the claimant to a patent. In this connection we might call to the attention of the court that the testimony shows that on the Jacob's Lake claim which Mr. Marshall visited there was copper-stained rock in a dump and scattered about on the claim. Witnesses for the government establish this fact. Joseph Jensen testified he found "some copper-stained rock lying on the claim." [R. 159.] Mr. Walker said he found some copper-stained rock on the Jacob's lode and that "it is possible that the copper-stained rock did come out of the cut in the Jacob's lode." [R. 134.] He further states, referring to the Jacob's lode, "I observed a little copper stain on a very little loose rock on the dump at this

cut.” [R. 133.] The government introduced assay certificates of some samples from Jacob’s lode which Mr. Walker had assayed, which showed a trace of copper. [R. 144-5.] It appears that the country where these claims were situated is a mineralized country, and that within a short distance from the Jacob’s claim was a copper mine which had been worked to some extent. Mr. Dimick, witness for the government, testified [R. 47]:

“I am not an engineer or geologist, just a cow-puncher. I cannot say of my own knowledge whether or not this land included in the Jacob’s lode, so-called, or Jacob’s Lake, contained mineral. *I would think it did from the looks of the rock. I saw there practically the same kind of rock as the Petosky and Coconino Company were working.* The nearest claims the Petosky and Coconino were worked would be a half mile from the Jacobs lode. They claimed they were working copper. * * * I never knew of any mineral being shipped from the Jacob’s lode. There was mineral shipped from the Petosky or Coconino mills. There was a mill and a smelter there.”

This witness for the government, who had lived in and ridden over this country for years, and who presumably had far greater knowledge of mineral lands than could be attributed to Mr. Marshall, was of the opinion that Jacob’s lode contained mineral, yet counsel for appellant contends that Mr. Marshall knew or was bound to know that the land was so deficient in mineral that there could not be a discovery, within the meaning of the mining law, upon which a patent might

have legally issued, and that Saunders must have made fraudulent representations in support of his application for a patent.

A person does not have to have a real mine to entitle him to a patent; a prospect may be sufficient even though a mine is never developed; counsel would contend that Mr. Marshall was bound to know that there never was even a prospect; that Saunders had wilfully perjured himself in his application for the patents. We forbear to comment on the fallacy of any such contention.

While we have assumed for the purpose of the foregoing argument, and counsel have assumed as a fact, that the court below based its finding of "legal fraud" upon false representations by Saunders as to the mineral character of the land, yet it should be borne in mind that there is no sufficient warrant for any such assumption, because, for aught that appears in the record, the court may have considered representations made by Saunders as to the mineral character of the land to be true, and based its finding of "legal fraud" on other false representations charged in the bill, such as, for instance, the amount of money expended in development work. If we should assume that such was the basis of the court's decision, we believe it would hardly be contended that there is anything in the record which would show that Mr. Marshall had notice, either express or implied, of the falsity of any such representations, much less that they were fraudulently made. All presumptions in favor of the judgment of the lower court not inconsistent or at variance

with the clearly established facts appearing in the record are to be indulged in favor of the decree of the lower court, so that if it should be necessary to do so this court might well say that the decree of the lower court was placed upon the ground that Mr. Saunders was guilty of "legal fraud" in respect of the representations made by him as to the amount spent in developing the claims. We deem it unnecessary to cite authorities in support of this principle.

We feel confident, however, that so plain are the other points made by us in support of the lower court's decree that there will be no necessity for invoking it.

Counsel's argument is based upon the further unwarranted assumption that because the claims may have been deficient in mineral Mr. Marshall was bound to know that the patents had been procured by fraudulent representations as to the mineral character of the land. But such is far from being the law; for it is true that a claim may not, as a matter of fact, contain mineral in sufficient quantity to entitle the claimant to a patent, yet if he believes that it does, and acts in good faith in respect to his application, and practices no fraudulent methods, the patent will not be set aside.

In the case of *U. S. v. Iron River Silver Mining Company*, 34 Fed. 569, Justice Brewer, delivering the opinion of the court, held that "before a court will set aside a patent to mineral land on the ground of fraud, it must appear not merely that the applicant was mistaken as to the character of the land, but that the representations in regard thereto were falsely *and* fraud-

ulently made, and this fact must clearly appear." The decree in this case was affirmed by the Supreme Court of the United States on appeal, 128 U. S. 673.

The only cases cited by counsel on the question of notice are the two on page 10 of his brief, and we will not consume the time of this court in analyzing them. An examination of them will clearly disclose that they fall entirely short of supporting any of counsel's contentions and in no wise militate against the position we have taken. They merely establish that where a person has knowledge of facts sufficient to put him upon inquiry, within the meaning of the law, he is presumed to have notice. We have no quarrel with this doctrine—it is the law. But the government in this case has entirely failed to bring this case within the principle. We assert as a fact, and the record bears us out, that every part of the transaction whereby the respondent acquired title to these lands, including all of the acts of Mr. Marshall, was clean and honest and done in the best of faith, and we respectfully ask that the decree be affirmed.

Respectfully submitted,

O'MELVENY, MILLIKIN & TULLER,

HENRY J. STEVENS,

Solicitors for Respondent.

No. 2894

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

4

UNITED STATES OF AMERICA,

Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a
Corporation.

On Appeal From the United States District Court
for the District of Arizona.

REPLY BRIEF FOR THE UNITED STATES

FILED

OCT 10 1917

F. D. MONCKTON,
CLERK.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a
Corporation.

On Appeal From the United States District Court
for the District of Arizona.

REPLY BRIEF FOR THE UNITED STATES

This is a simple case arising out of the fraudulent acquisition of non-mineral public lands under the mining laws and the subsequent sale of the lands to one who claims to be a bona fide purchaser. The District

Court held that the Government failed to show that the purchaser had received notice of the fraud committed by the patentee, and accordingly entered a decree dismissing the bill.

In view of the long established ruling so recently reaffirmed by the Supreme Court in *Wright-Blodgett Company v. United States* (236 U. S. 397), that the defense of bona fide purchaser is an affirmative defense which must be set up and established, the decree of the District Court was clearly erroneous and our original brief was practically limited to a discussion of that proposition.

Appellee's brief so misrepresents the Government's attitude and so distorts its theory of the case that we cannot permit it to remain unanswered and that constitutes our excuse for inflicting upon the Court this reply brief.

The plaintiff offered abundant evidence showing that the lands involved are not mineral; that no discovery of mineral was ever made thereon, and that they were acquired by the patentee, B. F. Saunders, solely because they contained water holes and springs; and that evidence was not contradicted. The defendant made no attempt to refute the showing in this regard—presumably because it would have been useless to do so. This being the situation, and the District Court having announced that if the case were one solely be-

tween Saunders and the Government, the latter would be entitled to a decree, we regarded it altogether unnecessary to consider that feature of the case and, as stated, confined our original brief to the question of law arising from the defendant's claim of innocent purchaser.

In the opening of their argument, counsel concede that our position on this question is sustained by the weight of authority, but they suggest that the rule is not universal, and then proceed during the course of their brief to so adroitly shift their position from time to time that they finally reach a point where the burden of proving notice is shifted upon the Government.

APPELLEE'S FIRST CONTENTION.

First, counsel contend that it is now too late to raise any question of defective pleading and that when evidence was offered tending to prove facts that had not been properly alleged, objection should have been made at the trial. This may well be granted, because, as we contend, not only was the defense not properly set up in the answer, but there was also an absence of evidence to establish it. It is particularly pointed out in our original brief (page 7) that the lack of a statement of the consideration is not in any manner supplied by the evidence, which in this respect is not a whit more definite than the bare allegation of the answer that a valuable consideration was paid for the land.

The truth is, at the trial of this case not only defendant's counsel and the Court, but apparently plaintiff's counsel also, proceeded upon the theory that upon the Government rested the burden of showing that the Cattle Company had notice of the patentee's fraud. This is clearly shown by the fact that a general demurrer to the original bill was sustained (R. 17, 18), upon which the bill was amended so as to charge notice more particularly (R. 19-32).

But the rights of the Government cannot be lost through the failure of its counsel and the trial court to properly understand the law. The allegation of the bill charging the Cattle Company with notice of the fraud by which Saunders acquired the patents was mere surplusage, and the plaintiff was not required to prove it. *United States v. Brannan* (217 Fed. 849).

APPELLEE'S SECOND CONTENTION.

Counsel next contend that the record shows conclusively that the defendant was an innocent purchaser; and in this connection complains that our brief calls the Court's attention to no evidence whatever, except that of Mr. E. J. Marshall. As Mr. Marshall was the only witness called by the defendant and it was upon his evidence alone that the defendant relied to establish its defense, we are unable to see any cause for complain-

ing that we confined ourselves to a discussion of his testimony.

At this point in their brief counsel take the ground that when a defendant, relying upon the defense of innocent purchaser, proves the payment of a valuable consideration, the burden of showing notice then shifts to him who alleges the fraud. Several cases are cited to support this proposition, two federal and a number of state cases. The latter we have not had an opportunity to examine, nor are we greatly concerned with their pertinency, in view of the rule so clearly announced by the Supreme Court, and which necessarily controls all federal courts.

The federal cases cited in this connection are *Jones v. Simpson* (116 U. S. 614), and *United States v. Cowart* (205 Fed. 316). The first of these cases arose under the Kansas statute for the prevention of frauds and perjury; and the personal property involved in that case had been delivered and the vendee proved the payment of a sufficient consideration. The Supreme Court held that in that state of the case and under the language of the statute, the burden of proving that the sale of the goods had been made with the intention to defraud creditors was upon him who alleged the fraud.

It is true that in the *Cowart* case the bill was dismissed upon the ground that the Government had failed to prove notice on Brannan, one of the defendant pur-

chasers, who in his sworn answer had denied knowledge of the fraud. But an important fact, which seems to have been overlooked by counsel, is that on the Government's appeal, this case was reversed by the Court of Appeals for the Fifth Circuit, in a decision which strongly supports our contention in this case. See *U. S. v. Brannan* (217 Fed. 849).

We cannot concede, therefore, that the burden of proof shifts at any stage of the proceeding and do not believe that a case can be found where the Government in an effort to secure cancellation of land patents procured by fraud was required to prove notice, merely because it was made to appear that the transferee had paid a valuable consideration for the land. While the record in the *Wright-Blodgett* cases is not before us, our recollection is that it shows that a valuable consideration, if not a fairly adequate one, was paid in each instance, notwithstanding which the court held the burden was upon the defendant to establish its purchase without notice.

APPELLEE'S THIRD CONTENTION.

Having thus satisfied themselves that upon its appearing that a valuable consideration was paid, the burden of proof is shifted, counsel claim that the record shows the payment of a valuable consideration for the

lands in this case and in support of this refer to the large sums paid for the entire ranch, including horses and cattle. It is said that the purchase price aggregated more than \$212,000, of which the sum of \$50,000 was paid for the lands.

This is inaccurate. According to Mr. Marshall, \$50,000 covered everything on the ranch, except the livestock. In this connection we cannot do better than to repeat the quotation from his testimony, where he said that the plant consisted of:

all the lands owned, scrip, lands, water appropriations, pipe-lines, troughs, corrals, buildings, wagons, supplies, harness, saddles, and everything that went to make up the equipment, and everything that in any way pertains to what is known as the V. T. ranch. That went in as the plant for the sum of fifty thousand dollars; that included all cabins, structures or houses that were located on owned property, or whatever Saunders' rights were to property on the Forest Reserve. In other words, my understanding was that it included any property that Mr. Saunders claimed through either legal or equitable right or through possession.

We therefore confidently reiterate that neither the answer nor the evidence shows what consideration, if any, was paid for the lands in controversy.

APPELLEE'S FINAL CONTENTION.

Counsel finally contend that a valuable consideration having been proved, the burden of showing notice

rested upon the Government and that this notice must be established by clear and convincing proof, reference being made to the Maxwell Land Grant case (121 U. S. 325) and other kindred cases.

This is but a begging of the question, because it assumes the truth of appellee's other contentions that a valuable consideration is shown to have been paid and that the burden of proof thereupon shifted to the Government. We do not consider it necessary, therefore, to discuss this proposition or to refer to the cases cited further than to say that the rule announced therein had reference to the character of proof required to establish the fraud by which the patents were alleged to have been secured. Moreover, this court is thoroughly familiar with the cases mentioned and no analysis by us is necessary to show how clearly distinguishable they are from the Wright-Blodgett cases and the case at bar.

Toward the conclusion of their brief, counsel characterize as "utterly flimsy" the claim of the Government that the record discloses facts sufficient to put Mr. Marshall upon inquiry; and they marvel that the Government of the United States should continue to prosecute this suit or that its counsel should have the temerity to assert before this court that the evidence shows that the respondent or Mr. Marshall was not acting in good faith in the purchase of this property.

In reply to this it is sufficient to say that nowhere

in our original brief is there an assertion that the record shows that either Mr. Marshall or his Cattle Company was not acting in good faith. In our theory of the case we are not required to show that; the burden was clearly upon the defendant to show affirmatively that it purchased without notice, and we contend that it did not do this. We referred to Mr. Marshall's testimony for the reason that he alone was offered to prove that the purchase had been made without the notice of Saunders' fraud, and in doing so mention was made of facts and circumstances which could not possibly have escaped his attention and which in our judgment were sufficient under the authorities to put him upon further inquiry, which, if followed up, would have inevitably disclosed the flagrant fraud that induced the issue of the patents.

What we neglected to do (because we considered it unnecessary) was to point out particularly the facts and circumstances tending to show actual notice of the fraudulent character of the mining claims, but in view of counsels' complaint, and at the risk of stretching the office of a reply brief, we shall do it now.

It should be said here that no distinction is attempted between Mr. Marshall and his Cattle Company, because none exists. In law they are one. In the memorandum agreement entered into between Saunders and Mr. Marshall on July 30th, 1907, it was expressly provided that the latter would organize or cause to be organized a corporation to be known as the Grand Canyon Cattle

Company, which would be authorized to acquire and hold the property in question (R. 438, 439). Notice to Mr. Marshall, therefore, was notice to the company. *Linn & Lane Timber Company v. United States* (236 U. S. 574.)

Government's witness, Chas. Dimick, was appointed ranch foreman for Saunders in 1901, and from that time until the ranch was sold to the Grand Canyon Cattle Company he remained foreman and assisted in or conducted the work looking to the development of water on the ranch (R. 39, 102, 103). Dimmick had an intimate knowledge of the entire situation, as he had taken part either in the location of each one of the so-called mining claims or in the proceedings to acquire title from the Government. In the case of the Sunset Lode and Mill Site he made the affidavits of expenditures (R. 344); in each of the other cases he made affidavits as to posting of notice for application of patents (R. 362, 370, 377). The testimony of this witness shows that practically all the so-called assessment done upon the several claims was done for the purpose of developing water (R. 60-69). Mr. Dimmick was in charge of the ranch when it was visited by Mr. Marshall and the latter's manager, H. S. Stevenson, in June and September, 1907 (R. 211, 323). Mr. Marshall admitted that Stevenson had been associated with him for fifteen years as manager of his cattle interests (R. 322).

Dimmick testified that it came to his attention in May or June, 1906, by way of a letter from Saunders, that a deal was on between him and Stevenson. The letter had been destroyed and the only thing recalled by Dimmick was that Saunders stated that he contemplated the sale of the whole property to Mr. Stevenson, and the next information Dimmick received in regard to the matter was in the summer of 1907, when Stevenson and Mr. Marshall visited the properties to look them over (R. 210, 211). On the occasion of that visit a number of the water holes on the ranch were inspected, including several of those found on the lands in controversy (R. 211). When asked as to whether he knew anything concerning the capacity in which Mr. Stevenson was acting, Dimmick replied that he was inspecting and looking over the property with the view of purchasing; that Stevenson said it was his business to look over the property and inspect it for that purpose (R. 228).

Mr. Stevenson not only visited the ranch in June and September of 1907, but he was there later in October, when the counting and branding of the cattle took place. On that occasion he was met by Seldon F. Harris, Forest Supervisor, who was making his fall inspection of the range (R. 260-263). Harris testified that in the course of a conversation with Mr. Stevenson, the latter was frankly informed that several of the claims, including the Jacobs Lode, were being held by the Gov-

ernment as invalid and that it was very doubtful in his (Harris') opinion whether patent on the same would ever be issued, because reports of all Forest Supervisors showed these claims to have been located to obtain water sources and not for mining purposes, and further that the claims did not contain mineral (R. 265, 266).

Defendant's counsel's objection to this testimony was sustained by the Court on the ground that it had not been established that Stevenson was agent for the Cattle Company; and the testimony was taken under rule 46. It may be that Stevenson was not the agent of the Cattle Company in the summer and fall of 1907, because the company was not organized until October of that year, but Stevenson was clearly acting for Marshall, and the Cattle Company depended for its very existence upon Marshall's carrying out the promise he had made Saunders.

Again, it should be observed that the sale of the property to the defendant Cattle Company was not consummated until December 5th, 1907. Indeed, all of the purchase price was not paid until June 10th, 1909 (R. 405). Mr. Marshall testified that after the deeds were executed December 5th, 1907, Dimmick was made foreman for the Cattle Company, just as he had formerly been for Saunders (R. 328). He admits, however, that the company paid the men employed beginning December 1st. He was inclined to believe that possibly a few of the men were paid for November, but he

testified positively that Dimmick received his first salary for the month of December and none before that (R. 329, 330). Dimmick's testimony in this regard is to the effect that on the occasion of Marshall's second visit to the ranch the latter stated that he would like Dimmick to remain on the property to handle it for a while in the same way he had been handling it for Saunders (R. 219); that his last payment as foreman for Saunders was about the last of October, 1907; that he received his first payment either from Mr. Marshall or Stevenson about the first of January, 1908, being compensated for a part of the month of November from the Grand Canyon Cattle Company. His recollection was that his services with the company commenced November 15th (R. 221).

It is true that Marshall testified that the only tracts in ~~the~~ controversy that he visited was Jacobs Lode; but it is stated in the agreement entered into with Saunders (supra) that he had "personally and through his agent examined" the properties to be purchased. Whether the agent thus referred to was Stevenson or Dimmick or someone else, does not appear, but Mr. Marshall is in any event chargeable with notice of what an inspection of the property would have shown. *United States v. Krueger* (228 Fed. 97). In the case cited the Court of Appeals for the Eighth Circuit held that the purchaser of the land from one who had acquired patent through the location of scrip was charged with the notice of possession by another; in other words, a man who

buys land will not be heard to say that he did not know what could have been learned by a fair inspection of it. (Winona and St. Peter Railroad Co. v. United States, 165 U. S. 483.)

Our review of the circumstances tending to show notice is not to be taken as an admission that there is an obligation on the Government to prove notice, because we do not recognize that any such obligation exists. But counsel have laid so much stress upon Mr. Marshall's bare denial of notice, claiming that in the face of it the Government should not continue to prosecute the case, that we have felt justified in inviting attention to certain admitted facts and circumstances which we would ask the Court to contrast with his unsupported denial.

Respectfully submitted,

S. W. WILLIAMS,

Special Assistant to the Attorney General.

October, 1917.

No. 2894.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

Grand Canyon Cattle Company,
a Corporation,

Respondent.

FILED
OCT 22 1917
F. D. MONTGOMERY

ANSWER TO REPLY BRIEF OF APPELLANT.

O'MELVENY, STEVENS & MILLIKIN,
HENRY J. STEVENS,
Solicitors for Respondent.

No. 2894.

**United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.**

United States of America,

Appellant,

vs.

Grand Canyon Cattle Company,
a Corporation,

Respondent.

ANSWER TO REPLY BRIEF OF APPELLANT.

Counsel for appellant has filed what he terms a "Reply Brief," and we are availing ourselves of the right given on the oral argument to file an answer.

Counsel states that we have adroitly shifted our position from time to time until we have reached the point where the burden of proving notice is shifted upon the Government. We except to the statement of

counsel that we have shifted our position at any time or in any respect. On the contrary the position we have taken has been consistently maintained throughout the entire course of this litigation.

Counsel's unwarranted criticism evidently resulted from a misunderstanding of the law applicable to the question of burden of proof in cases of this kind. While it may be admitted for the purposes of the argument, that the burden of proving the defense of *bona fide* purchaser rests upon the defendant, yet, as we have always contended, that burden is sustained when the defendant shows the payment of a valuable consideration. This *prima facie* at least constitutes proof that the defendant was a *bona fide* purchaser. Upon such proof being made, the presumption arises that the purchase was made in good faith and without notice. This presumption is based upon the fact that it is extremely unlikely that a vendee would purchase and pay a valuable consideration for property if he had knowledge of a latent equity existing in a third person, and that bad faith will not, in such circumstances, be presumed. The presumption of good faith, thus indulged by the law, imposes the burden of proving notice upon the party claiming the equity.

We have already called the court's attention to a number of authorities which fully supports this doctrine, and there is absolutely nothing in the Wright-Blodget case, so much relied upon by counsel, which is at all at variance with the rule, and counsel have cited no case holding to the contrary.

In addition to the cases already cited by us upon

this proposition, we beg leave to call attention to the following:

Williams v. Smith, 128 Ga. 306, 57 S. E. 801;

Johnson v. Neal, 67 Ga. 528;

Block etc. Co. v. Holcomb etc. Co., 75 N. W. 499 (Iowa);

Daly v. Rizzuto, 109 Pac. 276 (Wash.);

Atkinson v. Greaves *et al.*, 11 So. 688 (Miss.);

Morris v. Daniels, 35 Ohio St. 417;

Lamar's Extr's v. Hale, 79 Va. 147;

Kruse v. Conklin, 108 Pac. 856 (Kas.);

Hull v. Diehl *et al.*, 52 Pac. 782 (Mont.);

See note to Sec. 759, Vol. 2, Pomeroy's Eq. Jurisprudence, p. 1356, third edition.

Counsel calls attention to the fact that the case of United States v. Cowart, 205 Federal 316, cited by us in our former brief, was overruled by the court in United States v. Brannan, 217 Federal 849. This statement is correct, and it is also true that we inadvertently overlooked the fact in our brief. An examination, however, of the opinion delivered by the Circuit Court of Appeals will show that the point upon which the decision turned, was that there was *no proof* of the *payment of a valuable consideration* otherwise than by a mere recital in the deed; and the court held that according to the weight of authority this recital was not sufficient; and right here we would suggest that the inference might well be drawn that if the proof of payment of a valuable consideration had been made in a satisfactory manner, the ruling

would have been otherwise, and the judgment of the lower court sustained.

The court in its opinion in that case says:

“To be entitled to protection as a *bona fide* purchaser, he must have bought in good faith and paid value. United States v. Des Moines etc. Co., 142 U. S. 510, 530, 12 Sup. Ct. 308, 35 L. Ed. 1099. The burden was upon him to make satisfactory proof of *purchase and payment*. The recital in the deed to him did not constitute such proof

* * * There was *no evidence* that either the patentee's deed to Wilson or Wilson's deed to Brannan was supported by any valuable consideration. The result of the absence of *such evidence* was that the affirmative defense pleaded was wholly unsupported. The evidence adduced having clearly made out the case stated in the bill, and no defense set up having been supported by evidence, the plaintiff was entitled to a decree canceling the patent and vacating the subsequent conveyances of the land embraced in it.”

There is certainly nothing in the decision of the case which is at all out of harmony with our contention, or the decisions which we have cited in support thereof, that when proof of the payment of a valuable consideration is made, the law raises the presumption that the purchase was without notice of any equity, and the burden of showing to the contrary rests upon the party claiming such equity.

We think it may also be fairly inferred from the opinions in the case of the United States v. Clark, in the Circuit Court of Appeals (138 Federal 294) and the Supreme Court of the United States (200 U. S.

601), that proof of payment of a valuable consideration is sufficient to establish, *prima facie* at least, the defense of *bona fide* purchaser, and that this *prima facie* showing casts the burden of proving notice upon the other party.

Counsel, on page eight of his reply brief, says that the cases which we cited to the effect that notice must be proven by clear and convincing evidence, do not so hold; that they decide merely that the original fraud in procuring of the patent must be proven by such character of evidence. This is utterly at variance with the fact, as an examination of the cases cited will clearly demonstrate.

On page nine of his brief counsel says that he has never asserted that Mr. Marshall or the Cattle Company was not acting in good faith. It may be true that such assertion was not made in so many words, but when counsel says, as he does in his opening brief (page 12), that Mr. Marshall must have been "blind indeed not to see that the patents had been improperly obtained from the Government." It is almost equivalent to asserting that the purchase was made by Mr. Marshall with knowledge of Saunders' alleged fraud, and therefore in bad faith; a claim which finds no support in the record and is in fact utterly unfounded.

For the first time in this case it is now claimed that Dimmick had knowledge of Saunders' fraud, and that by reason of his employment by the Grand Canyon

Cattle Company in December, 1907, *after the purchase had been consummated, and after the deeds had passed and the money had been paid*, the Cattle Company is to be charged with knowledge of everything that Dimmick had learned while employed by Saunders. As above stated, this point is made for the first time in this reply brief; it would seem to be very much of an afterthought and not regarded by counsel as of much importance.

In answer to the point, however, we would call the court's attention first to the fact, as admitted by counsel, that Dimmick did not enter the employ of the Cattle Company until after the deal had been closed in Salt Lake on the 5th day of December. This is in strict accordance with Mr. Marshall's testimony [Record 317-318.]

Counsel calls attention to testimony of Mr. Dimmick to the effect that he thought his employment might have begun earlier than this, but we submit that, considering all the other testimony in the case, it is highly probable that Mr. Marshall's version is correct; but if there is any conflict, this court, under the law, would hold that the lower court accepted Mr. Marshall's statement as true. As supporting Mr. Marshall, however, we call the court's attention to the fact that to the last moment before the deal was closed Dimmick was representing Saunders.

Mr. Marshall testified:

"There were Mr. Dimmick, Mr. Clark and Mr. Saunders representing Mr. Saunders' interests, and Mr. Stevenson and myself representing my interests

and it was, as a final result of that conversation that the ten thousand head were agreed upon.”

This statement is made with respect to negotiations which were carried on as to the number of cattle to be paid for, and which negotiations proceeded well into the night of the day when the transaction was closed.

As a legal proposition, any knowledge that Dimmick may have had while he was the agent of Saunders should not, under the circumstances disclosed by this record, be imputed either to Mr. Marshall or the Grand Canyon Cattle Company. The evidence shows that Dimmick was merely a cattle foreman, with no power whatever to engage in any financial transactions. Mr. Marshall testified [Record page 317]:

“His duties were to be that of superintendent of the cow ranch, looking after the cattle and the water and the range conditions. He was to have no power to purchase anything or sell anything at that time other than supplies for the ranch * * * Mr. Dimmick, while he was in my employ, never did anything for the Grand Canyon Cattle Company other than to look out for the cattle and the grazing and the water, and make such improvements as he was authorized to make, after first being passed upon by the board of directors of the Grand Canyon Cattle Company.”

There is no contradiction of this testimony, and it thus clearly appears that the matter of notice as to the condition of the title to these lands was something entirely outside of the scope of Mr. Dimmick's employment, and hence no knowledge which he had

gained in respect thereof could legally be imputed to the Grand Canyon Cattle Company after he became its employee.

It is also a well established principle, that knowledge gained by an employee before his employment is not to be imputed to his employer, unless, among other things, it is *clearly* made to appear that this knowledge was in the mind of the agent at the time of his employment and at the time of the transaction with his principal.

It is also true that where the circumstances are such that an agent would not be likely to divulge knowledge possessed by him, such knowledge will not be imputed to the principal.

Goerz v. Barstow, 148 Federal 569;

Bank of Oberton v. Thompson, 118 Federal 798;

Brown v. Cranberry etc. Co., 72 Federal 101;
Wittenbrock v. Parker, 102 Cal. 103.

If there was fraud in the procurement of patents on the part of Saunders, and Dimmick was a party thereto, as claimed by counsel, it would hardly be presumed that at the time he was employed by the Grand Canyon Cattle Company he would have imparted all knowledge of such fraud, possessed by him, to his new employer. Furthermore, Dimmick's position with his former employer was more or less confidential, and this is another reason why it would not be presumed that he would betray his former employer by telling of his fraudulent acts to a subsequent employer.

It is also claimed that the Grand Canyon Cattle Company is charged with notice of whatever knowledge Mr. Stevenson possessed. It does not appear that Stevenson knew anything more than Mr. Marshall, except as to an alleged conversation between Stevenson and the witness Harris, which the court declined to admit. No claim of error was made in the original brief, nor indeed do we understand that counsel now claim in this reply brief that there was error in the court's ruling in this particular. Of course, if the ruling was right, the testimony taken under equity rule 46 cannot be considered. But in any event we say that the court was right in its ruling in excluding this testimony of statements made to Stevenson; for the reason that any such statement made to him would not bind his employer. Stevenson was merely a cattle foreman or superintendent, and had no authority whatever concerning the purchase of this property.

Mr. Marshall testified as to Stevenson's employment:

"Mr. Stevenson appeared at the V. T. ranch in October, 1907, *to count the cattle*. Mr. Stevenson was with me on the second trip which I made to the Buckskin Mountain Range in 1907, early in September." [Record p. 327.]

"He was there for the purpose of arranging or constructing the corrals and seeing that shoots were built in order to make the count later in the year in compliance with the July 30th contract." [Record p. 327.]

The following questions were put to Mr. Marshall:

“Q. Is it true that Mr. Stevenson in all of these negotiation with Mr. Saunders was representing you as your manager?”

To which he answered, under rule 46, “He was not.” [Record p. 323.]

And on page 324 he testified:

“If he found such a place (that is a good cattle range) he was not authorized to enter into any negotiations.”

In other words the testimony of Mr. Marshall shows beyond any question that Mr. Stevenson was simply acting for him as a cattle or stock foreman or superintendent, and there is not a bit of testimony to show that he had any authority whatever to enter into any negotiations or do anything in any financial transaction involving the purchase of any range property. It should, of course, be borne in mind that the burden was on the Government to first prove that Stevenson was the agent of Marshall, and the scope of the agency, before any conversation with Harris would be admissible. This the Government wholly failed to do. But in any event the statement alleged to have been made by the witness Harris to Stevenson is of no moment whatever.

The record shows that Harris said to Stevenson while they were branding the cattle in October, 1907:

“I was frank to inform Mr. Stevenson that *certain* claims known as the ‘Kane Lode,’ ‘Kane Millsite,’ and the ‘Jacobs Lode’ were being held by the Government as being invalid, and that it was very doubtful in my opinion if patent on the same *would ever be issued*,

because reports of all forest supervisors showed these claims to have been located to obtain water sources and not for mining purposes, and further than that these claims were not upon mineral bearing rock in place."

In the first place the only claim referred to by the witness Harris, involved in this suit, was the "Jacobs Lode." The witness' statement was that it was doubtful if patents "would be issued." The fact was that a patent had already and long since been issued upon the only claim referred to by the witness which is in controversy in this suit. It is difficult to conceive, therefore, how the casual statement made by Harris to Stevenson that the patent would not issue on the claim, where it had already been issued, would impart notice to the Grand Canyon Cattle Company of anything whatsoever.

In this connection we again call to the court's attention the rule laid down by so many of the cases that mere suspicion, however strong, is not equivalent to notice.

It is stated that the Grand Canyon Cattle Company would be charged with all the knowledge that Marshall possessed, granting this for the purpose of the argument. We say first that Mr. Marshall is not shown to have had any knowledge other than what he would gain from the mere physical aspect of the claims, and this was certainly insufficient to impart notice of the alleged fraud of Saunders.

This conversation between Stevenson and Harris took place long after the contract of July 30th was

made, at which time Mr. Marshall paid \$15,000.00 in cash.

It is our contention that on July 30th, when this contract was made, and \$15,000.00 was paid, Mr. Marshall then acquired an equity equal to that of the Government, if not superior, and that all of this equity was transferred to the Grand Canyon Cattle Company. We further contend that having acquired at least an equal equity as early as July 30th, 1907, the Grand Canyon Cattle Company had a right to buttress this equity with the legal title, and that having done so it occupies a superior position in this suit to that of the Government. That a legal title thus acquired will overcome an equity is well established, even though such legal title be acquired with knowledge of the equity. See:

Duber Watch Case Mf'g Co. v. Dougherty, 62
Ohio State 589, 596, 57 N. E. 455.

This case is cited and noted with approval in the leading case of United States v. Detroit etc. Co., 131 Federal 678, 679. See also the same case on appeal to United States Supreme Court, 200 U. S. 321. We might cite many other authorities to the same effect, but we deem it unnecessary so to do.

Respectfully submitted,

O'MELVENY, STEVENS & MILLIKIN,

HENRY J. STEVENS,

Solicitors for Respondent.

United States
Circuit Court of Appeals

For the Ninth Circuit.

ENRIQUE FLORES MAGON AND RICARDO
FLORES MAGON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

JAN 9 - 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ENRIQUE FLORES MAGON AND RICARDO
FLORES MAGON,
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*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 1071—CRIMINAL.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to
the Judges of the District Court of the United
States, in and for the Southern District of Cali-
fornia, Southern Division, Greeting:

Because in the records and proceedings, as also in
the rendition of the judgment of a plea which is in
the District Court before the Honorable Oscar A.
Trippet, one of you, between the United States
of America, plaintiff and defendant in error, and
Enrique Flores Magon and Ricardo Flores Magon,
defendants, and said Enrique Flores Magon and
Ricardo Flores Magon, plaintiffs in error, a mani-
fest error hath happened to the great damage of the
said plaintiff in error, as by complaint doth appear;
and we, being willing that error, if any hath been,
should be duly corrected, and full and speedy justice
done to the parties aforesaid, and in this behalf, do

command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and [3*] there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this June 26th, 1916.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States for
the District of California.

By Chas. N. Williams,
Deputy Clerk.

The foregoing writ of error is hereby approved.

OSCAR A. TRIPPET,
District Judge.

I hereby certify that a copy of the within writ of error was on the 26th day of June, 1916, lodged in the clerk's office of said United States District Court for the Southern District of California, Southern

*Page-number appearing at foot of page of original certified Transcript of Record.

Division, for the said defendants in error.

J. H. RYCKMAN,

Attorney for Defendants in Error.

WM. M. VAN DYKE,

Clerk United States District Court, Southern District of California.

By Leslie S. Colyer,

Deputy Clerk. [4]

[Endorsed]: No. 1071—Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. Enrique Flores Magon and Ricardo Flores Magon, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed June 26, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [5]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1071—CRIMINAL.

ENRIQUE FLORES MAGON and RICARDO FLORES MAGON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error.

United States of America,
Southern District of California,—ss.

To the United States of America, and to Albert
Schoonover, United States Attorney for Cali-
fornia, Greeting:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit, at San Francisco,
California, within thirty days from the date hereof,
pursuant to a writ of error filed in the clerk's office
of the District Court of the United States for the
Southern District of California, wherein Enrique
Flores Magon and Ricardo Flores Magon are plain-
tiffs in error and you are defendant in error, to show
cause, if any there be, why the judgment in the said
writ of error mentioned should not be corrected and
speedy justice should not be done to the parties in
that behalf.

Given under my hand, at Los Angeles, in said
District, this June 26th, 1916.

OSCAR A. TRIPPET,
Judge.

Service of the within citation is hereby accepted
at Los Angeles, California, this 26th day of June,
1916.

ALBERT SCHOONOVER,
U. S. Attorney for Southern District of California.

[6]

[Endorsed]: No. 1071—Criminal. In the District
Court of the United States, in and for the Southern

District of California, Southern Division. Enrique Flores Magon and Ricardo Flores Magon, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Citation on Writ of Error. Filed June 26, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [7]

Names and Addresses of Attorneys.

For Plaintiffs in Error:

J. H. RYCKMAN, Esq., 921 Higgins Building,
Second and Main Sts., Los Angeles, California.

For Defendants in Error:

ALBERT SCHOONOVER, Esq., United States
Attorney, Los Angeles, California. [8]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 1071—CRIMINAL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Defendants. [9-10]

Indictment.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and sixteen,—

The grand jurors of the United States of America, chosen, selected and sworn, within and for the division and district aforesaid, on their oath present:

That Enrique Flores Magno, Ricardo Flores Magon and Wm. C. Owen, hereinafter in this indictment called defendants, whose full and true names, and the full and true name of each of whom, other than in this indictment stated, is unknown to the grand jurors, late of the Southern Division of the Southern District of California, did, on the 18th day of December, in the year of our Lord one thousand nine hundred and fifteen, knowingly, willfully, unlawfully and feloniously, deposit and cause to be deposited in the postoffice and the stations thereof at the city of Los Angeles, in the county of Los Angeles, State of California, and within the said Southern Division of said Southern District of California, and within the jurisdiction of this Honorable Court, certain mail matter, to wit, a newspaper published and printed in the said city of Los Angeles, and named and called the “Regeneracion,” which said

newspaper did then and there contain certain indecent, vile and filthy substance and language, and which said newspaper was a publication of an indecent character, and which said indecent, vile and filthy [11] substance and language was of a character tending to incite in the minds of persons reading the same murder and assassination, and which said substance and language was so printed and published in said "Regeneracion" in the Spanish language, and was and is in the words following:

"Wilson esta en connivencia con Carranza, porque este viejo embaucador ha prometido a aquél favorecer a los capitalistas americanos en México; es decir. Carranza ha prometido a Wilson entregar al pueblo mexicano atado de pies y manos a la misma plutocracia rapaz americana a la que Diaz lo tuvo esclavizado."

which said language being interpreted and translated into English means and is as follows:

"Wilson is in connivance with Carranza, because the old sharper has promised Wilson that he would favor American capitalists in Mexico. That is to say, Carranza has promised to deliver the Mexican people, tied hand and feet, to the same rapacious American plutocracy that had Diaz enslaved."

and said newspaper of said indecent character was so deposited and caused to be deposited in said United States postoffice at said city of Los Angeles, to be transmitted by the postoffice establishment to many and divers persons within the United States of America, and within the Republic of Mexico, the

names of which divers persons are unknown to the grand jurors, and many copies of said newspaper were so deposited and caused to be deposited in said United States postoffice at one time and as one act to be so distributed by said postoffice establishment and delivered respectively, a copy each, to said many and divers persons. [12]

Contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

SECOND COUNT.

And the grand jurors aforesaid, on their oath aforesaid, do further present:

That Enrique Flores Magon, Ricardo Flores Magon and Wm. C. Owen, hereinafter in this indictment called defendants, whose full and true names, and the full and true name of each of whom, other than in this indictment stated, is unknown to the grand jurors, late of the Southern Division of the Southern District of California, did, on the 25th day of September, in the year of our Lord one thousand nine hundred and fifteen, knowingly, willfully, unlawfully and feloniously, deposit and cause to be deposited in the postoffice and the stations thereof at the city of Los Angeles, in the county of Los Angeles, State of California, and within the said Southern Division of said Southern District of California, and within the jurisdiction of this Honorable Court, certain mail matter, to wit, a newspaper published and printed in the said city of Los Angeles, and named and called the "Regeneracion," which said newspaper did then and there contain certain inde-

cent, vile and filthy substance and language, and which said newspaper was a publication of an indecent character, and which said indecent, vile and filthy substance and language was of a character tending to incite in the minds of persons reading the same, murder and assassination, and which said substance and language was so printed and published in said "Regeneracion" in the Spanish language, and was and is in the words following: [13]

"Justicia y no balazos, es lo que lebe darse a los revolucionarios de Texas. Y desde luego, todos debemos exigir que cesen esas persecuciones a mexicanos inocentes, y, por lo que respecta a los revolucionarios, debemos exigir cambien que no se les fusile.

Quienes deben ser fusilados son los 'rangers,' y la turba de bandidos que los acompanan en sus depredaciones."

* * * * *

"!Nada de reformas! Lo que necesitamos los hambrientos, es la libertad completa, basada en la independencia economica. !Abajo el llamado derecho de propiedad privada! Y mientras este derecho inicuo continúe en pie, en pie continuemos y con las armas en la mano todos los proletarios. !Basta de burlas! Proletarios: a quien os habla de carrancismo, escupidle el rostro y quebradle los hocicos.

!Vive *tierra y Libertad!*"

which said language being interpreted and translated into English means and is as follows:

"Justice, and not bullets is what ought to be

given to the revolutionists of Texas, and from now on we should demand that those persecutions to innocent Mexicans should cease, and as to the revolutionists, we should also demand that they be not executed (shot).

The ones who should be shot are the 'rangers' and the band of bandits who accompany them in their depredations.'

* * * * *

"Enough of reforms! What we hungry people need is entire liberty based on economic independence. Down with [14] the so-called rights of private property, and as long as this evil right continues to exist we shall continue under arms. Enough with mockery! Poor people, whoever speaks to you about Carranzismo, spit in their face and break their jaws.

Long live land and Liberty!"

and said newspaper of said indecent character was so deposited and caused to be deposited in said United States postoffice at said city of Los Angeles, to be transmitted by the postoffice establishment to many and divers persons within the United States of America, and within the Republic of Mexico, the names of which divers persons are unknown to the grand jurors, and many copies of said newspaper were so deposited and caused to be deposited in said United States postoffice at one time and as one act, to be so distributed by said postoffice establishment and delivered respectively, a copy of each, to said many and divers persons.

Contrary to the form of the Statutes of the United

States in such cases made and provided, and against the peace and dignity of the said United States.

THIRD COUNT.

And the grand jurors aforesaid, on their oath aforesaid, do further present:

That Enrique Flores Magon, Ricardo Flores Magon and Wm. C. Owen, hereinafter in this indictment called defendants, whose full and true names, and the full and true name of each of whom, other than in this indictment stated, is unknown to the grand jurors, late of the Southern Division of the Southern District of California, did, on the 6th day of November, in the [15] year of our Lord one thousand nine hundred and fifteen, knowingly, wilfully, unlawfully and feloniously, deposit and cause to be deposited in the postoffice and the stations thereof at the city of Los Angeles, in the county of Los Angeles, State of California, and within the said Southern Division of said Southern District of California, and within the jurisdiction of this Honorable Court, certain mail matter, to wit, a newspaper published and printed in the said city of Los Angeles, and named and called the "Regeneracion," which said newspaper did then and there contain certain indecent, vile and filthy substance and language, and which said newspaper was a publication of an indecent character, and which said indecent, vile and filthy substance and language was of a character tending to incite in the minds of persons reading the same, murder and assassination, and which said substance and language was so printed and pub-

lished in said "Regeneracion" in the Spanish language, and was and is in the words following:

"Ves, pues, hermano carrancista, que el problema que tratan de resolver los rebeldes que van a quedar en pie, con las armas en la mano, cuando Carranza sea Presidente, es el mismo problema que tienes que resolver tu, porque te afecta de la misma manera que a ellos. Tu deberes ayudarlos, y para ello, no entregues las armas cuando se ordene el licenciamiento de tropas carrancistas. Lo que debes hacer en ese momento, o antes si te es posible, es rebelarte, volviendo tu fusil sobre tus jefes y oficiales, sin que te tiemble el pulso al disparles tu arma, porque son tus *en emigos*, puestienen interes en que perduren las instituciones que los capacitan para llevar una vida privilegiada. Un corazon bien puesto, pulso firme y certera punteria, eso es lo unico que necesitas para acabar con tus inmediatos [16] verdugos.'

Sin rindes tu arma, regresaras a tu hogar en la miseria, dispuesto a vender tu fuerza muscular a cualquier burgues por lo que tenga a bien darte. Nada habras ganado, mientras tus jefes y oficiales gozatan en la ciudad de toda clase de placeres, saborearan distinciones y ostentaran cruces y medallas en el pecho. Si te quedas en el ejercito carrancista como soldado permanente, seras un esbirro, un verdugo de tus hermanos de clase, porque serviras para apoyar a los ricos.

La honradez te senala el camino que debes tomar: el de la rebeldia contra todo gobierno

hasta alcanzar el triunfo de los principios contenidos en el Manifiesto de 23 de Septiembre de 1911, expedido por la Junta Organizadora del Partido Liberal Mexicano, principios que abogan por la muerte del Capital, de la Autoridad y del Clero de todas las religiones.

Decidete a seguir este camino. Que no te engañen los sabi hondos con la majaderia de que necesitas tal o cual preparacion para emprender una lucha semejante. Esas son argucias de politicos; esos son sofismas propalados y fomentados por tus enemigos, aun cuando ellos se presenten con el caracter de amigos tuyos. Fue el argumento de los enemigos de la gran revolucion Francesa, para impedir que se diera al pueblo la libertad politica; fue el argumento de Porfirio Diaz para impedir que se te dieran libertades; es el argumento de los policicos carancistas para que no obtengas la libertad economica, base de todas las libertades, y que no es otra que la facultad de ganarse la vida, por medio del [17] trabajo, sin necesidad de depender de nadie, facultad que se consigue solamente, entendiendole bien, solamente, haciendo que la tierra, las casas, la maquinaria, los medios de transportacion y los efectos almacenados, pasen a ser, por medio de la expropiacion, la propiedad comun de todos, hombres y mujeres, sin distincion de raza ni color. A quien te diga lo contrario, escupele la cara y aun matalo, pues es necesario, es absolutamente necesario iniciar un severo procedimiento de limpia revolucionaria.

Lo que nos estorba a los desheredados, debemos suprimirlo como se pueda: por la buena o por la mala! Como se suprime al tigre, como se aniquilia a la vibora de cascabel, como se aplasta a la tarantula. Los que te dicen que todavia no estas preparado para tal o cual conquista que te beneficia, son los que tienen interes en que se retarde tu emancipacion, para poder ellos entre tanto vivir a tus expensas.”

which said language being interpreted and translated into English means and is as follows:

“So you see, brother Carrancistas, the problem which is going to be solved by the rebels who retain their arms, when Carranza becomes president, is the same problem that you will have to decide because it affects you in the same manner. Your duty is to help and for this purpose do not surrender your arms when the troops are ordered disbanded. What you should do at such a time, or before, if possible, is to rebel, turn your arms against your chiefs and officers and without trembling pulse open fire with your rifles, because they are your enemies, and are concerned [18] in having these conditions last forever, so they can have a life of privilege.

A strong heart, a firm pulse and steady aim is all you need to exterminate your immediate oppressors.

If you surrender your arms you will return to your home in poverty, ready to sell your blood and strength to the rich at their own price.

You will have accomplished nothing, but in the

meantime your chiefs and officers will enjoy, in the city, all kinds of pleasures and honors and display on their breasts crosses and medals. If you remain in the Carranza army as a permanent soldier you will be a bad man, an executioner of *you* brothers of your class because you will help to serve the rich.

Honor points to the road you should take; rebel against all governments until you attain the triumph of the principles comprised in the declaration of the 23 of September, 1911, expedited by the 'Mexican Liberal Party,' principles that advocate the death of Capital, or Authority and the clergy of all religions.

Decide to follow this road. Don't be deceived by the specious arguments of alleged wise politicians, these same arguments were used by the enemies of the great French revolution to prevent people from obtaining their political liberty. It was the argument of Porfirio Diaz to prevent you from obtaining your liberties; it is also the argument of the Carranza party used to prevent you from obtaining your economic liberty, which is the foundation of all liberties. This means the privilege of earning your living by working for yourself and being independent, and this can only be obtained, understand, by expropriation of land, houses, machinery, means of [19] transportation and merchandise, becoming common property without the distinction of men or women, race or color. He who tells you the contrary spit in his face, and even kill him,

because it is necessary, it is absolutely necessary to initiate a revolutionary campaign of house-cleaning.

We, the disinherited, must rid ourselves of those who are in our way, if we can, by hook or crook, the same as we get rid of the tiger, as we annihilate the rattlesnake, as we *sruch* the tarantula. Those who tell you that they are not prepared for this or other conquests which benefit you are the ones who have interest in delaying your emancipation so that in the mean time they can live at your expense."

and said newspaper of said indecent character was so deposited and caused to be deposited in said United States postoffice at said city of Los Angeles, to be transmitted by the postoffice establishment to many and divers persons, within the United States of America, and within the Republic of Mexico, the names of which divers persons are unknown to the grand jurors, and many copies of said newspaper were so deposited and caused to be deposited in said United States postoffice at one time and as one act to be distributed by said postoffice establishment and delivered respectively, a copy each, to said many and divers persons.

Contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

ALBERT SCHOONOVER,

United States Attorney.

M. G. GALLAHER,

Assistant United States Attorney. [20]

[Endorsed]: No. 1071. United States District Court, Southern District of California. The United States of America vs. Enrique Flores Magon, Ricardo Flores Magon, and Wm. C. Owen. Indictment for Viol. Sec. 211, Penal Code of 1910. Depositing in the United States Mails Indecent Matter. A True Bill. S. J. Brown, Foreman. Names of witness examined before the said grand jury on finding the foregoing Indictment: ————. Presented and filed in open court, this 18th day of February, A. D. 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. ————, United States Attorney. T. [21]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 1071—CRIM.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

ENRIQUE FLORES MAGON, RICARDO
FLORES MAGON et al.,
Defendants.

Verdict.

We, the grand jury duly impanelled in the above-entitled cause, find the defendant, Enrique Flores Magon, Not Guilty as charged in the first count of the Indictment, Guilty as charged in the second count of the Indictment, and Guilty as charged in the third count of the Indictment; and we find the defendant,

Ricardo Flores Magon, Not Guilty as charged in the first count of the Indictment, Guilty as charged in the second count of the Indictment, and Guilty as charged in the third count of the Indictment.

Los Angeles, California, June 6, 1916.

JOHN HORNER,

Foreman.

[Endorsed]: No. 1071—Crim. U. S. District Court, Southern District of California, Southern Division. The United States of America, vs. Enrique Flores Magon et al. Verdict. Filed Jun. 6, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [22]

Instructions Requested by Defendant.

REQUESTED BY DEFENDANTS:

Instruction No. II.

In like manner it is your duty to examine carefully the alleged ~~objectionable~~ matter as set out in the second count of the indictment, and if, after a full, careful and conscientious consideration of said alleged ~~objectionable~~ matter as set out in the second count, you and each of you are not convinced beyond a reasonable doubt, that said alleged ~~objectionable~~ matter is of a character tending to incite murder or assassination, then you must acquit the defendants on the second count of the indictment.

Instruction No. III.

In like manner it is your duty to examine carefully the alleged ~~objectionable~~ matter as set out in the third count of the indictment, and if, after a full,

careful and conscientious consideration of said alleged objectionable matter as set out in the third count, you and each of you are not convinced beyond a reasonable doubt, that said alleged objectionable matter is of a character tending to incite murder or assassination, then you must acquit the defendants on the third count of the indictment.

Instruction No. V.

If, however, after a full, fair and candid consideration of the alleged objectionable matter as set out in the second count of the indictment, you and each of you are satisfied beyond a reasonable doubt that said alleged objectionable matter is of a character tending to incite murder or assassination, it will then become your duty to consider whether the defendants, or either of them, on or about December 18th, 1915, did knowingly, wilfully, unlawfully and feloniously deposit or cause to be [23] deposited in the postoffice for mailing and delivery such objectionable matter as set out in the second count of the indictment, knowing it to be of a character tending to incite murder or assassination, and if you, or either of you, after a full, fair and candid consideration of all the evidence in the case and of these instructions, have a reasonable doubt that the defendant Ricard Flores Magon on or about December 18th, 1915, did knowingly, wilfully, unlawfully and feloniously deposit, or cause to be deposited in the postoffice for mailing and delivery the objectionable matter set out in the second count, knowing it to be of a character tending to incite murder or assassination, then it will be your

duty to acquit the defendant Ricardo Flores Magon on the second count of said indictment.

Instruction No. VI.

If, however, after a full, fair and candid consideration of the alleged objectionable matter as set out in the third count of the indictment, you and each of you are satisfied beyond a reasonable doubt that said alleged objectionable matter is of a character tending to incite murder or assassination, it will then become your duty to consider whether the defendants, or either of them, on or about December 18th, 1915, did knowingly, wilfully, unlawfully and feloniously deposit or cause to be deposited in the postoffice for mailing and delivery such objectionable matter as set out in the third count of the indictment, knowing it to be of a character tending to incite murder or assassination, and if you, or either of you, after a full, fair and candid consideration of all the evidence in the case and of these instructions, have a reasonable doubt that the defendant Ricardo Flores Magon on or about December 18th, 1915, [24] did knowingly, wilfully, unlawfully and feloniously deposit, or cause to be deposited in the postoffice for mailing and delivery the objectionable matter set out in the third count, knowing it to be of a character tending to incite murder or assassination, then it will be your duty to acquit the defendant Ricardo Flores Magon on the third count of said indictment.

Instruction No VIII.

If, however, after a full, fair and candid consideration of the alleged objectionable matter as set out in the second count of the indictment, you and each of

you are satisfied beyond a reasonable doubt that said alleged objectionable matter is of a character tending to incite murder or assassination, it will then become your duty to consider whether the defendants, or either of them, on or about December 18th, 1915, did knowingly, wilfully, unlawfully and feloniously deposit, or cause to be deposited in the postoffice for mailing and delivery such objectionable matter as set out in the second count of the indictment, knowing it to be of a character tending to incite murder or assassination, and if you, or either of you, after a full, fair and candid consideration of all the evidence in the case and of these instructions, have a reasonable doubt that the defendant Enrique Flores Magon on or about December 18th, 1915, did knowingly, wilfully, unlawfully and feloniously deposit, or cause to be deposited in the postoffice for mailing and delivery the objectionable matter set out in the first count, knowing it to be of a character tending to incite murder or assassination, then it will be your duty to acquit the defendant Enrique Flores Magon on the first count of said indictment. [25]

Instruction No. IX.

If, however, after a full, fair and candid consideration of the alleged objectionable matter as set out in the third count of the indictment, you and each of you are satisfied beyond a reasonable doubt that said alleged objectionable matter is of a character tending to incite murder or assassination, it will then become your duty to consider whether the defendants, or either of them, on or about December 18th, 1915, did knowingly, wilfully, unlawfully and feloniously de-

posit, or cause to be deposited in the postoffice for mailing and delivery such objectionable matter as set out in the third count of the indictment, knowing it to be of a character tending to incite murder or assassination, and if you, or either of you, after a full, fair and candid consideration of all the evidence in the case and of these instructions have a reasonable doubt that the defendant Enrique Flores Magon on or about December 18th, 1915, did knowingly, wilfully, unlawfully and feloniously deposit, or cause to be deposited in the postoffice for mailing and delivery the objectionable matter set out in the third count, knowing it to be of a character tending to incite murder or assassination, then it will be your duty to acquit the defendant Enrique Flores Magon on the third count of said indictment.

Instruction No. XI.

You are instructed that in order to convict the defendant Ricardo Flores Magon upon the second count of this indictment, it is not sufficient for you to be satisfied beyond a reasonable doubt that the objectionable matter contained in the second count is of a character tending to incite murder or assassination and that the defendant Ricardo Flores Magon wrote the [26] same to be printed and published in the newspaper "Regeneracion," but in order to authorize the conviction of said Ricardo Flores Magon upon the second count of the indictment it is necessary for you to be satisfied beyond a reasonable doubt that the said Ricardo Flores Magon either deposited or caused to be deposited said newspaper containing said objectionable matter in the postoffice for mailing and de-

livery, and if you are not satisfied beyond a reasonable doubt that the said Ricardo Flores Magon did deposit or cause to be deposited in the postoffice for mailing and delivery said objectionable matter, knowing it to be of a character tending to incite murder or assassination, then it is your duty to acquit said Ricardo Flores Magon upon the second count of said indictment.

Instruction No. XII.

You are instructed that in order to convict the defendant Ricardo Flores Magon upon the third count of this indictment, it is not sufficient for you to be satisfied beyond a reasonable doubt that the objectionable matter contained in the third count is of a character tending to incite murder or assassination and that the defendant Ricardo Flores Magon wrote the same to be printed and published in the newspaper "Regeneracion," but in order to authorize the conviction of said Ricardo Flores Magon upon the third count of the indictment it is necessary for you to be satisfied beyond a reasonable doubt that the said Ricardo Flores Magon either deposited or caused to be deposited said newspaper containing said objectionable matter in the postoffice for mailing and delivery, and if you are not satisfied beyond a reasonable doubt that the said Ricardo Flores Magon did deposit or cause to be deposited in the postoffice [27] for mailing and delivery said objectionable matter, knowing it to be of a character tending to incite murder or assassination, then it is your duty to acquit said Ricardo Flores Magon upon the third count of said indictment.

[Endorsed]: No. 1071—Crim. U. S. District Court, Southern District of California, Southern Division. The United States of America vs. Enrique Flores Magon et al. Instructions Requested by Defendants. Filed Jun. 6, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [28]

At a stated term, to wit, the January term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Thursday, the Twenty-second day of June, in the year of our Lord, one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1071—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

ENRIQUE FLORES MAGON et al.,
Defendants.

Minutes of Court—June 22, 1916—Judgment and Sentence.

This cause coming on this day for the sentence of defendants Enrique Flores Magon and Ricardo Flores Magon on the second and third counts of the indictment; Mansel G. Gallaher, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants En-

rique Flores Magon and Ricardo Flores Magon being present in custody of the U. S. Marshal, with their counsel. J. H. Ryckman, Esq., I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and the Court having read a statement or conclusions regarding the sentences of defendants, the Court thereupon pronounces judgment upon said two defendants for the offenses of which they now stand convicted, namely, depositing in the U. S. Mails indecent matter, in violation of Section 211 U. S. Criminal Code, as follows, to wit: The judgment of the Court is, that the defendant Enrique Flores Magon, on each of said two counts of the indictment, to wit, the second and third counts thereof, pay a fine of \$1,000, and be imprisoned in the United States Penitentiary at McNeil Island, [29] State of Washington, for the term of three years, said terms of imprisonment to begin and run concurrently, and that the defendant Ricardo Flores Magon, on each of said second and third counts of the indictment, pay a fine of \$1,000, and be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the term of one (1) year and one (1) day, said last-mentioned terms of imprisonment to begin and run concurrently; and it is further ordered, good cause appearing therefor, that the bail of defendant Ricardo Flores Magon be, and the same is hereby reduced to \$3,000, the bail of defendant Enrique Flores Magon to remain as at present in the sum of \$5,000; and a petition for a writ of error having been presented to the Court on behalf of defendants, together with

assignments of error and proposed order granting writ of error, and certain changes in form having been suggested by the Court, defendants are directed to redraft their proposed order allowing writ of error for consideration of the court hereafter.

Defendants are remanded to the custody of the U. S. Marshal. [30]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

No. 1071—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that upon the arraignment of the defendants Enrique Flores Magon and Ricardo Flores Magon in said cause at the Jan'y term of said court on the 26th day of February, A. D. 1916, the said defendants, by their counsel, demurred to the said indictment, said demurrer, omitting the caption, being as follows, to wit:

Demurrer to Indictment.

“Come now the defendants, Enrique Flores Magon and Ricardo Flores Magon, by their attorney

J. H. Ryckman, and demur to the indictment herein for the following reasons, to wit:

I.

That the facts stated in said indictment do not constitute an offense against the United States.

II.

That the matters and things set out in the first count of said indictment as having been printed and published in the newspaper "Regeneracion" are not of a vile or filthy or indecent character, nor of a character tending to incite in the minds of persons reading the same murder and assassination, or murder or [31] assassination within the jurisdiction of the United States, or elsewhere.

III.

That the matters and things set out in the second count of said indictment as having been printed and published in the newspaper "Regeneration" and not of a vile or filthy or indecent character, nor of a character tending to incite in the minds of persons reading the same murder and assassination, or murder, or assassination within the jurisdiction of the United States, or elsewhere.

IV.

That the matters and things set out in the third count of said indictment as having been printed and published in the newspaper "Regeneracion" are not of a vile or filthy or indecent character, nor of a character tending to incite in the minds of persons reading the same murder and assassination, or mur-

der, or assassination within the jurisdiction of the United States, or elsewhere.

J. H. RYCKMAN,
Attorney for Defendants Enrique Flores Magon and
Ricardo Flores Magon.

which said demurrer was overruled by the Court and denied, to which ruling of the Court the defendants and each of them then and there duly excepted; and the said defendants, being then and there arraigned in person, appeared and pleaded not guilty to said indictment.

BE IT REMEMBERED FURTHER, that on May 31st, 1916, the defendants Enrique Flores Magon and Ricardo Flores Magon, by their counsel, moved to quash said indictment, said motion to quash, omitting the caption, being as follows, to wit: [32]

**Motion to Quash Indictment and Order Denying
Same.**

“Now come the defendants Enrique Flores Magon and Ricardo Flores Magon before trial and move the Court to quash the indictment herein for the following reasons, to wit:

1. Because it is not alleged in said indictment that the newspapers, or any of them alleged to have been deposited in the postoffice by the defendants to be transmitted by the postoffice establishment to divers persons were addressed to such persons, or any persons.

2. Because it is not alleged in said indictment that said newspapers so deposited by the defendants were nonmailable.

3. Because it is not alleged in said indictment that these defendants, or either of them, knew that the newspapers, or any of them alleged to have been deposited by them in the postoffice contained indecent matter, nor is it alleged that the defendants, or either of them knew the import of said alleged indecent matter, nor that they, or either of them, knew that said matter was of a character tending to incite murder or assassination, nor is it alleged in said indictment that these defendants, or either of them, were the owners, or managers, or editors, or publishers of said newspaper, from which it could be inferred that they knew said newspaper contained indecent matter or matter tending to incite murder or assassination.

4. Because it is not alleged in said indictment that the objectionable matter is, or was of a character tending to incite murder or assassination.

5. Because the indictment is duplicitous in this, that in each count thereof, it charges an indefinite number of distinct offenses. [33]

WHEREFORE, these defendants pray that the indictment herein be quashed.

J. H. RYCKMAN,

Attorney for Enrique Flores Magon and Ricardo Flores Magon."

which said motion to quash was by the Court denied, to which ruling of the Court the defendants and each of them then and there excepted.

BE IT FURTHER REMEMBERED, that on the 31st day of May, A. D. 1916, being one of the days of the — term of said court, this cause came on

to be heard before his Honor, Judge Oscar A. Trippet, one of the Judges of said court, and a jury therein duly sworn to try said cause and the United States to maintain the issues of its part, called as witnesses: Alva Dougan, H. Treosti, Frank C. Mulkey, Irving A. Compton, J. D. Spence, Lucile Norman, C. T. Walton, Jacob D. Kaufman, W. Andrews, M. I. Leurner, Jas. Griffes, G. Wilshire, Frank Rooney, Aurther Fredgren, Roy E. Ashcroft, Loyal Jas. St. John, Jas. A. Chapman, and F. G. Thompson, who, being duly sworn, testified severally as follows:

(The defendant Enrique Flores Magon having taken the stand as witness in his own behalf and having admitted that on September 25th, 1915, November 6th, 1915, December 18th, 1915, and during the whole of the months of September, October, November and December, 1915, he was the owner the editor and the manager of the newspaper "Regeneracion" and caused copies of the said newspaper containing the alleged nonmailable matter set out in the several counts of the indictment to be deposited in the United States mail for distribution and the defendant Ricardo Flores Magon also having taken the stand as witness in his own behalf and having admitted that he wrote all of said alleged nonmailable [34] matter for the said newspaper "Regeneracion," the voluminous testimony of the witnesses for the Government is not herein set out.)

Here the Government rested.

And thereupon to maintain the issues on the part of the defendants, BE IT REMEMBERED that the

defendant Enrique Flores Magon, being called as a witness in his own behalf and on behalf of his brother Ricardo Flores Magon, testified in this case as follows:

Testimony of Enrique Flores Magon, in His Own Behalf.

My name is Enrique Flores Magon; I reside in Los Angeles; I am a newspaper writer, editor and publisher; I know of the Manifesto of the Mexican Liberal Party of September 23d, 1911; I was one of the signers with my brother Ricardo, and Anselmo L. Figueroa, Librado Rivera and Antonio de P. Araujo; I read and speak Spanish and English; the Manifesto was written in Spanish and was published in my newspaper "Regeneracion" in an English translation June 23d, 1914, and the translation is a faithful translation; I now own the newspaper "Regeneracion"; I have been connected with it as a writer since 1900; I have been connected with many other papers that I used to print in Mexico City and they were suppressed by the former President of Mexico, Porfirio Diaz on account of being opposed to his regime; I have been in charge of this paper "Regeneracion" since Anselmo L. Figueroa died, June 14th, 1915; "Regeneracion" is the official organ of the Mexican Liberal Party; "Regeneracion" as the official organ of the Mexican Liberal Party advocates the principles set up in the Manifesto of September 23d, 1911; when Anselmo L. Figueroa died on account of the ill treatment we received at Mc Niel's Island where we were sent for 23 months on bribed

(Testimony of Enrique Flores Magon.)

witnesses and forged documents; Figueroa got so sick that it [35] prevented him from being able to attend to the business of the paper; then I became the business manager of this paper; I have been a writer of the paper sixteen years; the policy of "Regeneracion" has always been the policy of the aims of the Mexican Liberal Party; I have been many times persecuted, but convicted only once in this country on June 25th, 1912, for violation of the neutrality laws between this country and Mexico; outside of this conviction I have never been convicted for any other offenses in the United States; on that conviction I was sentenced to McNeil's Island for 23 months; I was released from McNeil's Island January 19th, 1914; I came back right away to Los Angeles and took up again my editorial work in "El Regeneracion," and besides, I took up the work of farming, I produced vegetables in order to sell them out and help myself for living, because I didn't receive not a cent from the paper for my contributions at that time, so in order to make my living; I have to work as a farmer, besides working as a writer; my brother Ricardo was in the penitentiary at the same time I was and was discharged at the same time; since our discharge he has been collaborating to "Regeneracion" and, at the same time to make his living, he has been working in farm work; that is his present means of living; before I took over the ownership of "Regeneracion" Ricardo just wrote copy to hand to the editor so that the editor could see whether it was fit or not for publication,

(Testimony of Enrique Flores Magon.)

and that the editor would publish what he might see fit for publication; as to salary of compensation before I became owner Ricardo was on the same basis as myself; he did not receive a single cent from the paper, but made his own living from farming; since I have owned the paper Ricardo has just been collaborating for the paper; by [36] that I mean writing articles that he hands me for me to see the articles and find out if I see fit for the policy of the paper, and if I would care to use them or not; I did not pay him a single cent for those services; he worked in farming in order to make his own living; I myself was the final authority as to what appeared in "Regeneracion" in September, October, November and December, 1915; I am the only one who received all the copy that might come to the paper; I revised the copy; I look at it, and whenever I find that any copy is no good to be printed I take it away and throw it into the basket; and the material I find good to be given to the printer, I, myself, would go and give all the boys in the printing-shop, and order them to set up that article and print it; my brother Ricardo had no interest in any profits that the paper makes, nor does he share in any losses that the paper has; as to the circumstances under which I was arrested: I was at home, in my own private home, when somebody came there and told me that the police was outside waiting for me, looking for me. Then I went out to see what this gentleman wanted of me. When I came out, I found Detective Leon and then he collected the boys and said, "These want to speak

(Testimony of Enrique Flores Magon.)

to you.” “All right, let’s go.” And he took me to the officers and there I found several detectives, and amongst them, Mr. Thompson. When I reached there, Mr. Thompson said to me, “You are under arrest.” I told him, “Why?” “That is not your business. You are under arrest.” “Well, I think I have a perfect right to know why I am under arrest. I think I have a perfect right to request from you to show me the warrant for my arrest.” “Yes, I got the warrant here—(indicating).” “Well, it does not prove to me anything at all. Therefore, I beg you to show me the warrant.” “Oh, if *you* to see it, I will show you the warrant.” And he pulled out the warrant and started to read the warrant. Well, I saw the warrant. I convinced myself that it was a legal order, [37] and then I said, “All right, I am ready to go to jail, but I would like to get my hat and coat,” for I was in my shirt sleeves—“I would like to get my hat and coat.” “No, you don’t need anything.” “Well, sir, I would like to get my hat and coat in order to go to jail.” “Well, somebody heard me asking for my hat and coat, and they came with the hat and coat in their hands to hand it to me, and when I reached to take my coat and my hat, this Mr. Thompson, that seems to me was scared, perhaps somebody told him that we were roughnecks, he grabbed me by the arm and shoved me back. “Get back here, you son of a bitch.” Then, I say, “Gentlemen, that is not gentlemanly to treat a man,” and then he say, “If you don’t like that, then take this,” and hit my head. Of course, I

(Testimony of Enrique Flores Magon.)

found myself assaulted by this man, although he was —although he was a representative of the authority, for I thought I had a perfect right to protect myself, and I tried to strike him back, although I recognize I am a weak man, because at that time it was four days that I got up from bed where I was sick; I was weak; therefore, despite my weakness, I thought I should resist his vicious assault by this man, and I tried to strike him back, but other detectives, I think about five of them, jumped on my back and grabbed me by my back and overpowered me right away. I could do nothing. I was sick, and when these overpowered me, then this Mr. Thompson came with his revolver, and struck me two times more on my head until I was bathed with my blood from my head to my toes. My shirt was torn to pieces, and then seeing this man was still hitting me, in order to throw him away, and that I saw he would kill me sure, I tried to kick him away, when I was already overpowered by the other men. Then he stopped hitting me and I was dragged from the [38] house without even being allowed to tell goodbye to my people and my children and my wife. They dragged me out then like they would drive away wild beasts. They took me away from my family, from my home and my family just the same as they would take a wild beast, and this man took me without even hearing my protest because of his bad behavior with me; after that I was taken to the hospital because I was bleeding freely; I got a big scar, but he put eight stitches in my head, and it

(Testimony of Enrique Flores Magon.)

stopped bleeding, and after that I was taken to the marshal's office; I had not even a pen-knife; I had not even a pin on my possession, as can be proven by the authorities in the jail when I came to the jail, I got nothing on me; in fact, I am never armed; that was the first time I saw Thompson; I had no trouble with officers before that; I did not use the words, "To hell with the President" or anything relating to that at all; I did not use any of that vile, obscene and filthy language which Thompson said I used; when I got down to the marshal's office they took me to a room inside of the office, when you come inside, to the left hand, after you cross one room; here on the same floor, just in the same place they keep us now when they take us here. First, they took us to a room, and after we were called to another room to the right, and then we met this gentleman who is sitting down here, Mr. Walton, and when we entered, Mr. Walton say, "Are you the men charged with the publication of a Mexican newspaper?" And I answered, "Yes." Then he said, "I know you have got in trouble there, and I don't like that you might think that here we are roughnecks. I don't want that you might have a bad impression of my office. That is why I want to speak to you. Are you willing to speak to me?" "Yes, sir, we are willing to speak to you." I was [39] myself the one who was doing the talking, because my brother does not speak very well the English, at least, as I do speak the English, and I was doing all the talking; then, the gentleman said, "Well, you seem to be getting

(Testimony of Enrique Flores Magon.)

very often in trouble." I said, "Yes, we always get in trouble. We have been in trouble very long years ago, since we were in Mexico. We have been in trouble here in the United States, and expect to be always in trouble, because we are fighting for the benefit of our countrymen. We are fighting for the living of the Mexican people. We are striving to gain their freedom, their social, economic and political freedom, so that all the Mexican people might become a people, a free people, and people, who would have all the means for happiness, all the means for living, all the means for to enjoy the honest joys of life." I am speaking as if I were speaking to Mr. Marshal there. I said: "We are striving to better the conditions of the Mexican people, and that is why we always get in trouble, because our fight is against the big interests of the bourgeois. That means the big interests, and we are fighting for the freedom of the people, and therefore we are against the big interests, and the big interests, of course, don't want us to continue this fight, because then if we would ever succeed, they will have no more people to work for them and enrich them. That we are striving to better the conditions of the Mexican people, and for that we knew we expect to get in trouble, because we are fighting the interests of the capitalists, like Mr. Rockefeller, Mr. Morgan, Mr. Guggenheim, Mr. Otis, Mr. Hearst, all those fellows who have profited by the regime of Porfirio Diaz. For instance, Mr.

(Testimony of Enrique Flores Magon.)

Otis got two million acres of land in Lower California—very rich land— [40]

Q. (By the COURT.) Did you tell that to Mr. Walton?

A. Yes, sir. They are rich lands, and this land was given to Mr. Otis just for a song, as they say in English, in order to have him boom the Diaz administration. Mr. Hearst got three million of acres, very rich land, too, in Chihuahua State, with the same purpose, to have him boom Porfirio Diaz's administration. Porfirio Diaz was a good man, although he was a tyrant. In the same way, through concessions here, concessions there, over twenty million acres of land have been given away to the capitalists of this country. This land has been taken away from the Mexican people by means of force. Whenever they opposed the land being taken away from them, they have been shot on the street, or in their homes by the soldiers of Porfirio Diaz, and those who wanted to go home by peaceful means were banished from night to day. We don't know what became of them, only their graves known. After everything was taken away from the hands of the Mexican people, and they lead up to American plutocracy, we were stripped of everything that belonged to us until we became slaves without a single cloth of any kind to lay down our tired heads after sixteen—eighteen hours of hard work every day for 37 cents a day; we became peons; that is why we are fighting against oppression; that is why we are fighting the tyrants in Mexico, the oppressors and exploiters of

(Testimony of Enrique Flores Magon.)

our race, because we want the Mexican people to be treated like men, that they enjoy all the joys of life, from the very moment that they have a perfect right, since they were born, in this earth. We are fighting for the freedom of the Mexican people. We are fighting for their liberation, so that they might become independent, so that they might have economic, social and political freedom, but chiefly economic freedom, because he who has economic freedom has political and social freedom too. Well, you [41] see, we have gone among our people; we ourselves, are Indian Mexicans. We are Indians; we are peons; we belong to the peon class, and that is why we want to have all our brothers to come into their own again; that is why, when we have seen so much injustice, so much oppression, such a terrible tyranny on the Mexican people, we became anarchists; that means we are not like other people; we are not bomb-throwers; we are not vile anarchists as the "Times" always says that we are, in order to misrepresent us to the people, and have the people prejudiced against ourselves. No. We became anarchists and we are anarchists because we want peace on earth, because we want, as we recognize, that all human beings should be friends, instead of being enemies, instead of fighting each other, as now; that is what I mean by anarchy, that we love peace; we love brotherhood and goodwill amongst all the human race, not only the Mexican race, but all the human race, and we want that all human beings love, and have the means to live and enjoy life like Mr.

(Testimony of Enrique Flores Magon.)

Guggenheim or Mr. Rockefeller, but everybody like everybody who would be willing to work with his own hand and produce. I told that to Mr. Marshal, and I explained to him for that reason we were always persecuted. For that reason we were thrown into jail each moment. In Mexico every moment, so many of them that forgot how many. After, when we were prohibited by Mr. Diaz to publish any paper in Mexico, we say, "Well, we are powerless here in Mexico. Then, let us go to the United States. There in the United States they enjoy freedom. That is the land of the free; in the United States there is refuge for political refugees; their constitution grants freedom to all, and of course, freedom of press and freedom of speech, so let us go over there and enjoy the freedom, the [42] freedom granted there to the people," and we came here. There was not one year that we were in this country but that we were thrown into jail again. We didn't find the freedom here that we expected. I told the marshal that while we were in San Antonio, a hired assassin tried to assassinate my brother, when he was there with his dagger in his hand to stab him; I knocked him down, inside my own home; I knocked this man down, and I was taken to jail and sentenced to three months, \$30 fine and costs of the proceedings, because I protected my brother's life; I told him, too, here the last time we were convicted for a felony, that the Assistant District Attorney, Dudley W. Robinson, who then was taking the place of this gentleman

(Testimony of Enrique Flores Magon.)

here, Mr. Gallaher—I told him that these gentlemen went and bribed witnesses, and that they had come and swore to an affidavit before a notary public in which he stated that he was bribed by Mr. Dudley W. Robinson, that he was paid \$10 a day for a year; in the meantime, while we were out on bond, and waiting for our trial, he got \$10 a day; he got besides \$300 cash the day we were convicted as a premium to our conviction, and he, himself, acknowledged that he went and bribed many other witnesses. I told him that these documents, because there were many affidavits on that line of all the Government witnesses, those affidavits were sent to Mr. Wilson while we were in McNiel's Island, already, and Mr. Wilson read the affidavits and then he say to Senator Smith from Arizona, "I am perfectly convinced that the Magons are innocent, but it is not my policy to let them free," and we were not let free; it was denied, our petition for pardon. I told him that after a while we were denied the benefit of the parole. We applied for parole, although the warrant there gave [43] a very strong recommendation in our behalf, Mr. Johnson, the director of paroles, came to us and said, "Gentlemen, I am very sorry for you. I am convinced that you are innocent, but I have received instructions from Washington not to grant you parole," and we have to serve the full length of our sentence. Then we came out and got again in trouble, because we are still fighting for the freedom of our country, of our people, and that is why I told Mr. Marshal when I talked with him, I

(Testimony of Enrique Flores Magon.)

told him, "What do you suppose, Mr. Walton—or Mr. Marshal, that Tom Paine, Tom Jefferson and Franklin had received the same treatment in France, the same treatment that we are receiving in this country, then United States would not exist, there would not be the land of the free at all. This would be something like when these were under England. I finished with that, my talk with Mr. Walton. Every article that is written by my brother, before going to the printers is given to me. As to all the rest of the articles, I know that I would have inspected all the writings, and would have to decide which one must be published, and which one must not be, so the one I choose for publication I hand up to the printers, and the one that I don't choose for publication, I throw them into the basket, because I have no use for them; so these articles pass under my eyes before being sent to the printers and were O. K.'d by me; I am the editor, the owner and the publisher, and business manager, and everything in this paper. This paper belongs to me; and therefore I am the boss of it; no one else has authority there. Since June 14th, 1915, the paper has been in my hands, and I have been and am the owner of it; until to-day the paper is still mine; Ricardo works for the paper—he writes articles, and I am the one to choose them and see if [44] they are fit for my paper, and to put them in my paper; I have never done anything to promote hatred between the United States and Mexico; I have been carrying on this propaganda through the "Regeneracion" for about

(Testimony of Enrique Flores Magon.)

sixteen years; my brother Ricardo wrote for the paper; he always has done the same way he is doing now, writing and giving the copy to the editor of the paper; the articles that have his name at the bottom are the ones he wrote; those that are approved by the editor have his name on the bottom of it, and they are the ones he wrote.

Q. (By Mr. GALLAHER.) And those articles were written by him, the defendant Ricardo Flores Magon, and handed to you for publication, if you approved them, in the "Regeneracion"?

A. Yes, when I have been the editor of the paper and the owner of it, yes, it has been always handed to me for my approval.

Q. And that paper during all the time that he was writing articles for it was transmitted through the United States mails? A. Yes.

Q. (By Mr. GALLAHER.) What was done with the papers in the months of September, October, November and December, 1915, after they were published and printed?

A. I did send them through the mails.

Q. (By Mr. GALLAHER.) Now, your brother worked at the office, and frequently made contributions to the paper?

A. He did; he used my office if he wanted to write anything on my typewriter.

Q. Well, did he do it there?

A. Of course he has to come there to write his articles.

Q. Yes, and he delivered them right there?

(Testimony of Enrique Flores Magon.)

A. And delivered them to me for my inspection.
[45]

Q. Do you know whether or not he read the "Regeneracion" himself, during those months?

A. I don't know, I never was watching him.

Q. You don't know, do you?

A. I don't know. He may have read them and he might not. I am such a busy man that I cannot be looking into the others' actions, you know.

Q. Your positive answer, then, to the question is that you don't know whether Ricardo read them or not? A. Yes, sir; that is the answer.

BE IT REMEMBERED FURTHER that while testifying in his own behalf, the following question was propounded to Enrique Flores Magon by his counsel, to wit:

"When you deposited copies of your newspaper 'Regeneracion' containing the alleged nonmailable matter set out in the second and third counts of the indictment herein, in the mail for distribution, or caused the same to be done, did you thereby intend to incite murder or assassination?" To which question counsel for the Government objected on the grounds that the same was incompetent, immaterial and irrelevant, whereupon the Court sustained the objection and the defendant Enrique Flores Magon then and there excepted.

BE IT REMEMBERED FURTHER, that thereupon Ricardo Flores Magon, one of the defendants herein, being called as a witness on behalf of himself and his brother Enrique Flores Magon, being first duly sworn, testified as follows in this cause.

**Testimony of Ricardo Flores Magon, in His Own
Behalf.**

My name is Ricardo Flores Magon; I am a brother of the defendant Enrique Flores Magon; I reside in Los Angeles and have resided here since 1906; I was arrested on this charge February 18th, 1916, and have been confined in the jail and the hospital [46] since that time; I have been undergoing treatment in the hospital for diabetes; at the time of my arrest my business was that of a writer; I was not employed by anyone; I write for several publications here and abroad, including "Regeneracion"; I have been writing for "Regeneracion" for several years; I have never received any salary for my contributions to "El Regeneracion" nor any pay at all, nor do I share in the profits. My brother Enrique Flores Magon was the owner and publisher of "Regeneracion" from September 1st, 1915, to January 1st, 1916; I had no understanding or agreement with my brother concerning the printing of any article I wrote; I gave the copy to my brother and that is all; I did not tell him what to do with my contributions except to say "Here is my copy. If the copy is good, you do what you please"; I was arrested at the office of the newspaper "Regeneracion" by Detective Leon and another gentleman that I do not know; there were about twelve officers; I was not armed; I was present when my brother Enrique Flores Magon was arrested by Deputy Marshal Thompson; I heard what took place between Deputy Marshal Thompson and my brother at the time of

(Testimony of Ricardo Flores Magon.)

the arrest; Thompson told my brother he was arrested and then my brother asked him to allow him to get his coat and hat, and somebody handed the coat to my brother; I feel sick from my sickness, diabetes; I have been under treatment for that, but my treatment has stopped; I feel my brain is tired; physically I feel pretty bad; I have been sick about five or six months; the Government physician has examined me; I was sent to the hospital under his instructions and the instructions of the Court and was brought from the hospital here for this trial; at the time of our arrest my brother moved to take his hat and coat; Mr. Thompson pushed him roughly and I saw Thompson beat with the butt of his pistol my brother's head; that is what I saw; [47] he asked Thompson for a warrant and Thompson answered that it was not necessary, but finally he acceded and read one warrant, and my brother said, "All right; I am at your disposal"; I was distant from my brother and Thompson at the time of our arrest about twelve feet in the same room, and heard all that transpired between my brother and Thompson; my brother used no vile or obscene or filthy language to Thompson on that occasion; Thompson's testimony yesterday concerning what my brother said is not true; my brother said nothing that could mean to damn the President; my brother used none of the foul language that Thompson attributed to him yesterday; I was present at the marshal's office after I was arrested; I heard my brother testify yesterday as to what occurred in the marshal's office;

(Testimony of Ricardo Flores Magon.)

I heard Mr. Walton testify yesterday as to what occurred there; what my brother said on that occasion was substantially the truth; I read English; I wrote the articles in "Regeneracion" of dates September 25th, 1915, and October 2d, 1915, containing all of the alleged nonmailable matter set out in the second count of the indictment herein, the one being headed "the Texas Uprising," and the other being headed "The Carranza Reforms"; I also wrote the whole of the article appearing in the newspaper "Regeneracion" November 6th, 1915, containing all of the alleged nonmailable matter set out in the third count of the indictment herein; I wrote all of said articles in the Spanish language; they were printed in Spanish in said newspaper "Regeneracion," owned and edited at the time by my brother Enrique Flores Magon; all of those articles have been introduced in evidence in this case in our behalf in correct English translations and read to the jury; I have examined and compared the English translations of these articles introduced in evidence in this case with the original articles as written in Spanish by [48] me, and the English translations are substantially correct; I have an education in the Spanish language; I attended schools and colleges in Mexico for sixteen years.

BE IT REMEMBERED FURTHER that while testifying in his own behalf, the following question was propounded to Ricardo Flores Magon by his counsel, to wit:

"Did you intend, or was it your purpose, in writ-

ing for publication in "Regeneracion," the alleged nonmailable matter set out in the second and third counts of the indictment herein, to incite murder or assassination?" To which question counsel for the Government objected on the grounds that it was incompetent, immaterial and irrelevant, whereupon the Court sustained the objection, to which ruling of the Court the defendant Ricardo Flores Magon then and there excepted.

BE IT REMEMBERED FURTHER that the defendants introduced in evidence in their own behalf the Manifesto of the Mexican Liberal Party, in words and figures as follows, to wit:

MANIFESTO OF THE MEXICAN LIBERAL PARTY.

MEXICANS:

The Organizing Junta of the Mexican Liberal Party views with sympathy your efforts to put in practice the lofty ideals of political, economic and social emancipation, the reign of which on earth will put an end to that strife between man and man which has lasted long enough and has its origin in that inequality of fortunes which springs from the principle of private property.

To abolish this principle means the annihilation of all the political, economic, social, religious and moral institutions composing the environment within which are smothered the free initiative and the free association of human beings, who, if [49] they wish to save themselves from perishing, are obliged to set on foot a cruel competition from which

there issue triumphant not the best, not the most self-sacrificing, not the most gifted, physically, morally or intellectually, but the most cunning, the most egotistic, the least scrupulous, the hardest hearted, those who place their own personal well-being above every consideration of human solidarity and human justice.

But for the principle of private property Government would have no reason for its existence, since it is needed only to keep in check the complaints of the disinherited or their rebellions against those who have got into their grasp the social wealth. Neither would there be any reason for the existence of the Church, whose exclusive object is to strangle in the human being, by practicing patience, resignation and humility, his innate tendency to rebel against oppression and exploitation; silencing the cries of the most powerful and fruitful instincts with the practice of penances that are immoral, cruel and injurious to personal health. In order that the poor may not aspire to the enjoyment of this earth, and constitute themselves a danger to the privileges, of the rich, it is promised the humblest, the most resigned and patient, a heaven dandled in the infinite, away there beyond the stars which they can barely see.

Capital, Authority, the Clergy—here we have the sombre trinity which makes this beauteous earth a paradise for those who have succeeded, by cunning, violence and crime, in getting into their claws what the sweat, the blood, the tears and the sacrifice of

thousands of generations of toilers have produced; and a hell for those who, with arm and brain, till the soil, set the machinery in motion, build the houses and transport [50] the products; the result being that humanity is divided into two classes whose interests are diametrically opposed—the capitalish class and the working class; the class that owns the land, the machinery of production and the means of transportation, and the class that has only its arms and intelligence with which to support itself.

Between these two social classes there cannot be any bond of friendship or fraternity, because the possessing class is always bent on perpetuating the economic, political and social system that guarantees it the tranquil enjoyment of its robberies, while the working class endeavors to destroy this iniquitous system and put in its stead a method whereby the land, the houses, the machinery or production and the means of transportation may be for the common use.

MEXICANS: The Mexican Liberal Party recognizes that every human being, by the very fact of his having come into existence, has a right to enjoy each and all the advantages modern civilization offers, because those advantages are the product of the efforts and sacrifices of the working class throughout all time.

The Mexican Liberal Party recognizes labor as necessary for the sustenance of the individual and of society, and all, therefore, with the exception of the aged, the crippled, the deficient and children, must dedicate themselves to the production of some-

thing useful, that will satisfy our wants.

The Mexican Liberal Party recognizes that the so-called right of private property is an iniquitous right, because it compels the great majority of human beings to work and suffer for the satisfaction and ease of a small number of capitalists.

The Mexican Liberal Party recognizes that Authority and the Clergy are the mainstay of the iniquity of Capital, and [51] therefore:

The Organizing Junta of the Mexican Liberal Party has solemnly declared war against Authority, war against Capital, war against the Clergy.

Against Capital, Authority and the Clergy the Mexican Liberal Party has raised the Red Flag on Mexico's fields of action, where our brothers are fighting like lions, disputing the victory with the bourgeoisie's hosts, whether those hosts call themselves Maderistas, Reyistas, Vazquistas, Cientificos or what else, since their one purpose is to hoist some individual into the position of first magistrate of the country, in order that, under the shelter of his wing, they may do business without any consideration whatever for the mass of Mexico's population, since they all regard as sacred the right of individual property.

In these moments of confusion, so propitious for the attack on oppression and exploitation; in these moments when Authority, broken, thrown off its balance, vacillating, attacked on either flank by every unchained passion, by the storms of all the appetites that have been set on edge by the hope of being soon able to glut themselves; in these moments of despair-

ing distraction, of agony, of terror on the part of Privilege, the compact masses of the disinherited are invading the lands, burning the title deeds, laying their creative hands on the fertile soil and menacing with their fists all that yesterday was respectable—Authority, Capital and Clergy. They are turning the furrow, scattering the seed and awaiting, full of emotion, the first fruits of a labor that is free.

These, Mexicans, are the first practiced results of the propaganda and action of the soldiers of the proletariat; of the generous upholders of our equalitarian principles; of our brothers who are bidding defiance to all imposition and all exploitation [52] with this cry of death for those on top, but of life and hope for those below—"Land and Liberty!" The tepest renews itself from day to day. *Maderistas*, *Vazquistas*, *Reyistas*, *Cientificos*, *De La Barristas*—They are crying to you, Mexicans, to fly to the defense of the privileges of the capitalistic class. Do not listen to the sweet songs of these sirens, who wish to profit by your sacrifices that they may establish a new Government; that is to say a watchdog for the protection of the interests of the rich. Up! Every one of you, that you may bring to a head the expropriation of the wealth the rich are keeping back from you.

During the progress of this great movement expropriation must be brought to a head at every cost, as have done and are still doing our brothers, the inhabitants of Morelos, of Southern Puebla, of Michoacan, Guerrero, Veracruz, Northern Tamaulipas, Durango, Sonora, Sinaloa, Jalisco, Chihuahua,

Oaxaca, Yucatan, Quintana Roo and parts of other states. Mexico's bourgeois press itself has to confess that the proletariat has taken possession of the land without waiting for any paternal government to deign to make it happy, since that proletariat knows that it has nothing good to expect from governments, and that the emancipation of the workers must be the task of the workers themselves.

These first acts of expropriation have been crowned with the most smiling success; but we must not confine ourselves to taking possession of the land and implements of agriculture. The workers in all the various industries must resolutely take possession of them, so arranging things as that the land, the mines, the factories, the workshops, the foundaries, the cars, the railroads, the shipping, the ware houses and the houses may remain in the possession of each and every one of the inhabitants of Mexico, without distinction of sex. [53]

In each district where this act of supreme justice is brought to a head the inhabitants will have only to come to an understanding and take whatever may be found in the stores, warehouses, granaries, etc., to place easily accessible to all, where honest men and women will make and exact inventory of all that has been collected, and make a calculation as to the length of time it will last, the number of those who must use it being taken into account, from the moment of expropriation until the first crops are raised and the various industries turn out their first products.

The inventory having been made, the workers in

the various industries will come to a fraternal understanding as to the regulation of production, which should be so conducted as that none shall go in need during the progress of this movement, and those alone die of hunger who do not wish to work—the old, the crippled and the children, who shall be entitled to enjoyment of everything, alone excepted.

Everything produced will be sent to the general store, from which all will have the right to take ALL THEIR NEEDS REQUIRE, the only prerequisite being a certificate to the effect that they are working in such or such an industry.

Humanity's aspiration is to obtain the greatest possible amount of satisfaction with the least possible effort, and the method most adequate to that end is the working of the land and other industries in common. If the land is divided and each family takes a piece, there will be, in the first place, the grave danger of falling back into the capitalist system, for there will be no lack of the cunning or the miserly who will manage to get more than do others, and they may be able finally to exploit their equals. Apart from this grave danger it is the fact that [54] if a single family works a single piece of land it will have to work as hard, or even harder than it does to-day, under the system of individual property, to obtain the miserable result it now obtains; but, on the other hand, if the peasants unite their labor and work the land in common, they will toil less and produce more. Of course there is land enough to give every one a house and lot of his own, to use as pleases him. What has been said about the

cultivation of the land in common applies to work in the factory, the shop, etc. Each, in accordance with his temperament, his tastes, his inclinations, will be able to choose the kind of work that suits him best, provided he produces sufficient for his own needs and does not make himself a charge on the community.

Working in the manner pointed out, expropriation being followed immediately by the organization of production, now freed from the masters and based on the needs of the inhabitants of each region, nobody will be in want, despite the armed movement; and finally that movement, terminating with the disappearance of the last bourgeoisie and the last vestige of authority or its agents, the privilege-sustaining law, and with everything in the hands of those who labor, we all shall clasp one another in a fraternal embrace and celebrate with shouts of joy the installation of a system that shall guarantee to every human being Bread and Liberty.

MEXICANS! It is for this that the Mexican Liberal Party is struggling. It is for this that a band of heroes, battling beneath the Red Flag, is pouring out its generous blood to the glorious cry of "Land and Liberty!"

The Liberals have not laid down their arms, despite the treaties of peace made by the traitor Madero with the tyrant [55] Diaz, and despite the urgings of the bourgeoisie that they should fill their pockets with gold. We have acted this because we Liberals are men who are convinced that political liberty does not benefit the poor but only the place-hunters, and because our object is not to

obtain places of honors, but to take everything out of the hands of the bourgeoisie, that it may remain in the power of the workers.

The activity of the different political bands now disputing among themselves for supremacy will result in the doing of exactly what the tyrant Porfirio Diaz did, inasmuch as no man, however well-meaning he may be, can do anything for the poor when he finds himself in power. That activity has produced a chaos which we, the disinherited, ought to turn to account, taking advantage of the country's special circumstances to put in practice, without loss of time and while on the march, the sublime ideals of the Mexican Liberal Party. We must not delay expropriation until *peach* shall have been made, for then the supplies in the stores, granaries, warehouses and other places of deposit will have become exhausted, and, owing to the prevalent state of war, production will have been suspended, which will lead to famine. On the other hand, if we carry out expropriation and the organization of free labor while the movement is afoot, neither then nor afterwards will any one go in need of the necessities of life.

MEXICANS! If you wish to be free, once and for all, battle for no other cause than that of the Mexican Liberal Party. All the others offer you political liberty after they shall have triumphed. We Liberals invite you to take immediate possession of the land, the machinery, the means of transportation and the houses, without expecting that anybody will give [56] them to you or that the law will decree it, for the law are not made for the poor but for

the frock-coated gentlemen who take good care that all is in favor of their caste.

It is the duty of us, the poor, to work and struggle to break the chains that make us slaves. To leave the solution of our problems to the educated and wealthy classes is to put ourselves voluntarily into their clutches. We the plebians, we the ragged, we the hungry, we who have no foot of land whereon to lay our heads, we who live tortured with anxiety as to the bread needed to-morrow by our wives and children, we who when we become old are discharged ignominiously because we cannot work; we have to make powerful efforts and a thousand sacrifices to destroy, to its very foundations, the edifice of the old society, which has been hitherto a tender mother to the rich and wicked, but a cruel step-mother to the poor and good.

All the evils which afflict humanity spring from the existing system, which compels the majority to toil and sacrifice itself that a privileged minority may satisfy all its needs and all its caprices while living in ease and vice. Things would not be so bad if all the poor were assured of work, and were it not that production is arranged not for the satisfaction of the toilers' needs but to produce what the bourgeoisie want, and they contrive that more than they can buy shall not be produced. Hence come periods when work shops or the number of workers is reduced; a condition furthered by the perfecting of machinery, which takes the place of the proletarian's muscles.

In order to do away with all this it is necessary that the workers take into their hands the machinery

of production, and that they themselves regulate the production of wealth, attending to their own needs.
[57]

Robbery, prostitution, murder, incendiarism, swindling—these are the products of a system which places men and women in conditions under which, in order to escape dying of hunger, they have to take where they can or prostitute themselves; for in the majority of cases, although they may be most anxious to work they cannot get it, or it is so ill paid that they cannot earn the wage necessary to meet the most imperious needs of themselves individually and their families. Apart from this, the long hours and the conditions in the midst of which work is done under the present capitalist system quickly make an end of the worker's health and even of his life, in those industrial catastrophies the sole origin of which is the contempt with which the capitalist class views those who sacrifice themselves for it.

Irritated by the injustice of which he is the subject; angered by the ostentatious luxury of those who do nothing; clubbed by the policeman for being poor; obliged to hire out his muscle to be employed in tasks which do not please him; badly paid; despised by all those who know more than he does or whom, having money, think themselves superior to those who own nothing; having before him the prospect of a miserable old age and the death of an animal discharged from the stable because no longer useful; rendered from day to day uneasy by the possibility of being without work; obliged to regard as enemies those of his own class, because he never

knows which of them will be the one to hire himself out for less than he himself is receiving; this being the poor man's position it is natural that anti-social instincts should develop, and that crime, prostitution, disloyalty, should be the natural fruits of the old and odious system which we are seeking to destroy to its lowest roots, that we may create a new one of love, of equality, of justice, of [58] fraternity, of liberty.

Arise then, as one man! In the hands of all are tranquility, well being, liberty, the satisfaction of all sane appetites. But let us not allow ourselves to be guided by directors. Let each be master of himself, that everything may be arranged by THE MUTUAL CONSENTING OF FREE INDIVIDUALITIES. Death to slavery! Death to hunger! Long live Land and Liberty!

MEXICANS! With our hands on our hearts and our consciences tranquil, we appeal, formally and solemnly to you all, men and women, to adopt the lofty ideals of the Mexican Liberal Party. While there are rich and poor, governors and governed, there will be no peace; and it is not to be desired that there should be peace, for that peace would be founded on the political, economic and social slavery of millions of human beings who suffer hunger, outrages, prison and death, while a small minority enjoys all kinds of pleasures and liberties, for doing nothing

On to the struggle! On to expropriation, with the idea of benefiting not a few but all; for this is not a war of bandits but of honest men and women who

desire that all shall be brothers and enjoy, as such, the good things that nature offers us so generously and that the muscle and intelligence of man have created, the sole condition being that each shall dedicate himself to truly useful work.

Liberty and well-being are within our grasp. With the same effort and sacrifice needed to elevate to power a governor, that is to say, a tyrant, we can now expropriate the wealth the rich hold back. Choose, then! A new governor, that is, a new *yok*, or redeeming expropriation and the abolition of all imposition, be it religious, political or what it may.

LAND AND LIBERTY. [59]

Los Angeles, California, U. S. A., Sept. 23, 1911.

(Signed) RICARDO FLORES MAGON,

LIBRADO RIVERA,

ANSELMO L. FIGUEROA,

ENRIQUE FLORES MAGON,

ANTONIO de PARAUJO,

BE IT REMEMBERED FURTHER that upon the trial of this cause the defendants in their own behalf introduced in evidence the whole of the article containing the nonmailable matter set out in the second count of the indictment, which said article was and is in words and figures as follows, to wit:

“THE TEXAS UPRISING.

For several weeks the capitalist press has been giving accounts of battles between *mexicans* and United States forces in territory comprising the Texas counties of Hidalgo, Cameron, Starr, and others adjoining those mentioned above.

Naturally, the real causes of that conflict are not mentioned. They want to make it appear that the uprisings of the Mexicans in that section of the United States is due to an understanding among Mexicans to carry out a Plan of San Diego, which advocates the independence of the vast territory grabbed by the United States from Mexico at the middle of the last century. As time passes, the real cause of that movement is appearing.

It is not the desire to put under control of Mexico the territory covered by the States of Texas, New Mexico, Arizona, Colorado, California and part of others, what has impelled the Mexicans residing in Texas, to rise in arms against the authorities of the United States, but a very distinct one; the desire to save themselves from the attempts of which people of our race are so frequently victims in this country.

Here is how a capitalist paper, 'El Presente' of San Antonio, Texas, explains the origin of the uprising. It says: [60] 'The origin of this revolt is found in the following facts: A Mexican was dancing in a house in a small town near Brownsville and an American tried to grab the woman that danced with him. The Mexican opposed this and as he stepped out on the street was treacherously killed by the American. The Mexicans immediately avenged the death of their countryman and this forced the avengers to leave the village already armed and disposed to defend themselves from a certain lynching or hanging. The precarious situation of several men presented them the opportunity

to rise in arms, and they took them to earn their bread in this violent form.'

How distinct is all this from the lies propounded by the rest of the capitalist press!

As is seen, the movement in Texas began with the rebellion of a handful of men that refused to be the victims of the ruling justice of that state against people of our race, and which handful of men was joined by all those, who, tired of offering their arms to the rich to be exploited, without getting the work sought, found in the attitude of the rebels a good opportunity to wrest by force from the hands of the capitalists, what these always deny to the poor; a piece of bread for themselves and families.

Naturally, those rebels were the victims of a ferocious persecution, because that is the way Madame Authority is: Immutable and ferocious to the extent that, instead of seeking peace among men, with its obstrusive acts excites them to war. Instead of approaching those men and in a well-meaning way trying to quiet them and assuring them the tranquility and liberty to which every human being is entitled, its representatives, those barbarians called rangers, 'a sort of rural police of the [61 American territory on the Mexican border, fired upon the rebels as soon as they sighted them. The rebels returned the fire and this was the beginning of the state of war in which that portion of the United States finds itself.

However, even the movement could have been confined to the conflict between the original rebels and the rangers; but Authority is not a shield or a

shelter of the poor, but its lash, therefore instead of protecting the poor inhabitants in the region in which it persecuted the rebels, it began to hostileize them in a thousand ways, pretending to find a rebel in each Mexican baron the minions happened to come across, and then the rangers began an infamous manhunt against the Mexicans. The rangers, reinforced civilians, hordes of police-thugs and mercenaries of all descriptions, would enter and trample the humble habitations occupied by the Mexicans; for Authority never bothers the bourgeoisie, or whom it is the watch dog, and there they would deliver themselves to veritable orgies, only proper of cannibals, discharging their arms upon men, old men, women and children trying to avenge on innocent people the losses that in open combat the rebels had inflicted upon them.

One of the many houses assaulted, was that of Comrade Aniceto Pizana, man of honesty, who resided with his family near the Tulitos rancho, adjacent to Brownsville. The house was assaulted on August 3 by a horde of savages, representatives of Authority, firing indiscriminately upon the inhabitants regardless of age or sex. Aniceto is not a man that allows being trampled upon; he is a man conscious of his rights, and with three more comrades that happened to be in his house at that time, returned the fire of the bandits who numbered from 20 to 35. And hard was the battle that ensued. Our four comrades demonstrated prodigious [62] valor, as the assailants were well fortified, and notwithstanding the fact that all the advantages were on the side of the lackeys, our heroic brothers

held them at bay for over half an hour, killing and wounding several of them. Unfortunately a little boy, Pizana's only son, was wounded on the leg by a shot from the bandits, and it was necessary to amputate it. Ever since then Aniceto also is under arms, and according to the capitalist press, his activity is very intense.

The case of Aniceto is not an isolated case. The same thing happened in other places of the Brownsville region. Similar outrages were committed by the representatives of Authority on persons who perhaps never thought of rebelling; but who were forced by circumstances to take up arms to defend themselves from the savage assaults, to save their lives and that of their dear ones; or, at least, to have the satisfaction of exchanging a laborious and honest life, for the life of a criminal "ranger," of a minion or volunteer of the savage State of Texas.

Here is how a spark of rebellion was propagated, and what started as a vulgar persecution to a handful of persons, has been transformed through the stupidity of Authority into a veritable Revolution. There is no such thing as Plan of San Diego or any scheme of that kind; what there is, is a movement of real defense of the oppressed against the oppressor. Those under arms are not as the prostituted capitalist press tries to make it appear, but men who finding no protection in Authority, seek it in the rifle; men who prefer to sell their lives dear rather than permit being killed like muttons by bandits without conscience or honor.

The crimes committed by the "rangers" in this

last two months, and, particularly in this last two weeks, twitches the [63] nerves of the dullest man. Hundreds of innocent Mexicans have been killed by those savages, among the victims being men, young and old, women and children. The houses where the Mexicans live have been burned, their crops razed, and such attempts have contributed to extend the revolutionary movement. A local paper, 'The Los Angeles Tribune,' says in its issue of the 8th of last month, referring to the zone involved in the Revolution of the State of Texas: ' territory as large as the State of Illinois is fearfully apprehensive of midnight attacks, burning of fields and death.'

In another part of the same issue, the same paper says: 'More than five hundred Mexicans have been killed on the Rio Grande within the last three weeks, according to reports from the rangers to-day,—September 7—to police officials in the counties affected by the Revolution.'

This is what the 'rangers' confess; but knowing the criminal instincts that integrate the mercenary bodies of those ferocious beasts in the State of Texas, it is to be presumed that they have been short in their information, and that the victims of Authority must ascend to a higher number.

Here is how 'El Presente' speaks referring to the victims of the 'rangers': 'Nobody knows who killed those found hanging to trees or riddled with bullets; but everybody points to the 'rangers.' And it adds: 'Men have been killed under a bed and in their

houses, notwithstanding their plea for a moment of peace to explain. They have been dragged from jails to be hung and mostly to be shot from the back after they have delivered their arms and surrendered.'

Shot from the back after they have surrendered! Can better proof of felony be extracted from a 'ranger'? [64]

This is, very strikingly what happens in Texas. It is not a movement of bandits as the capitalist press tries to make it appear, but a natural uprising of man that seeing his very existence menaced, defends himself as best he can.

Justice and not bullets is what ought to be given to the revolutionists of Texas, and from now on we should demand that the persecutions to innocent Mexicans should cease, and, as to the revolutionists, we should also demand that they be not executed (shot).

The ones who should be shot are the 'rangers' and the band of bandits who accompany them in their depredations.

RICARDO FLORES MAGON."

"THE CARRANZA REFORMS.

Venustiano Carranza has succeeded in attracting followers by making good his promises of distribution of the land and public land grants to the towns and communities.

Seeing that the people no longer have faith in promises to be carried out 'after the triumph,' he is making those promises effective, he is putting in

practice the reforms he added to his program when he realized that the people fight to acquire the material things that shall give them economic independence, without which individual liberty is impossible.

In Veraacruz, Yucatan and some other States controlled by Carranza, the distribution of land is being made among the rural people, and the towns are receiving endowments of public lands. But will the realization of such promises give the disinherited the liberty and well-being to which they have a right as human beings that they are? We do not believe it, because such reform will not kill the so-called right of private property. That iniquitous right, the source of all the ills that accurse humanity, remaining on foot, its two powerful supporters will [65] also live: the Church and the State, that is, the priest and Authority, without which Capitalism could not exist.

It would not be so bad if those land grants were made by free title, that is, if nothing was charged for them to the beneficiaries; but that is not so; the farmer who receives a piece of land, has to pay its value to a landlord thru the government. He has to pay, besides, contributions so that the President of the Republic may live and amuse himself, and also the Ministers of his cabinet, the deputies, the senators, the judges, the magistrates, the functionaries of the denominations, soldiers, policemen, jailers, . . . to say nothing of the consulate and diplomatic representatives, to whom enormous sums must be paid to represent the country, and the thousand and one canories and grafts that

they divide among themselves and favorites of the rulers, and the immense sums that besmear the hands of functionaries; big and small, apart of their legal salaries.

All of this has to be paid, besides the fabulous sums of money invested in war materials, in public buildings and a thousand other things, all costly because all want to extract profit from them, and besides, also, the national debt which amounts to sums almost inconceivable to the imagination.

The farmer, within the system of individual or private property, has to pay for the irrigating water parcel, he has to pay for the wood that he brings from the forest or from the wood-yard of the capitalist, he has to build his shack at his expense and the implements and animals he needs for his work, he must have provisions to keep from dying of hunger while he raises his first crop, he must have money to buy the seeds he needs to plant. To sum up: He needs money for everything that [66] he wants, and even for what he does not need, but which weighs upon him, brutalizes, bleeds and exploits him: Authority and the Clergy.

And if the year is bad, what anguish! The government will exact its contributions, as if the crops had been good; the money-changer will exact his loan from the farmer, without consideration of any kind. Then he will have to sell or mortgage his horse or ox, or to borrow more money to come out ahead and fill some other bellies, the bellies, of our executioners, while our children, our wives and our aged parents languish before our eyes, the victims of

our pertinacity to want a government, suffering the consequences of our lack of courage to tell our revolutionary chiefs: we want no reform! We want the abolition of the right of private or individual property: We want all that exists to be for all. And tearing into a thousand pieces the personal flags, agitate very highly the Manifesto of the 23d of September, 1911, whose principals are the only ones that guarantee to every human being liberty and well-being, because it wants no more private property, nor Authority, nor Clergy.

The poor, the real pariah, the disinherited that has not a stone where to lay his head, has nothing to gain by Carransista reforms, because he needs money to start work on a piece of land, but let us suppose that he had something for provisions, implements for work and the most indispensable things that would enable him to subsist while he raised the first crop, and supposing furthermore, that the crop was good, the markets being controlled by the capitalists, the farmer would be subjected to sell his products at a paltry price to the grabbers, that for which he had worked more than any laborer [67] for a mean pittance, and misery and sorrow would continue to reign in his home, while happiness and plenty would reign in the homes of the bourgeoisie, in the same way that it occurred before the Revolution.

The Carrancista reforms are the most bloody jokes that the proletariat could have ever received. His agrarian reform is a slap on the face of the disinherited.

Enough of reforms! What we hungry people need is entire liberty based on economic independence. Down with the so-called rights of private property, and as long as this evil right continues to exist we shall continue under arms. Enough of mockery! Poor people, whoever speaks to you about Carrancismo spit in their face and break their jaws.

RICARDO FLORES MAGON."

BE IT REMEMBERED FURTHER that upon the trial of this cause the defendants in their own behalf introduced in evidence the whole of the article containing the alleged nonmailable matter set out in the third count of the indictment, which said article was and is in words and figures as follows, in English translation, to wit:

"TO CARRANCISTA SOLDIERS.

Carrancista soldiers, listen: Very soon, your First Chief, shall remain almost master of the situation, and I say almost master of the situation, because there are rebels that will not submit to the authority of Venustiano Carranza, but who will prefer to remain arms in hand, expounding a worthy existence for the cause of humanity, before surrendering his arms to a government, which like any other government on Earth, shall not be anything else but a prop on which capitalism relies to continue its exploitation of the working class at leisure, that is, [68] to have the poor perpetually under the domination of the rich.

These rebels that shall continue on foot, are your brothers, they are poor like you, and like you before

shouldering a gun shed their sweat in the furrow, leaving with it a land that was not theirs. They, like you, audaciously submerged themselves in the darkness of the mines, disputing with the rocks the precious *met* also which were to fill the coffers that were not theirs. They, like you, defied extenuation and consumption in the factory side by side with those iron workers called machines, producing silks that would not cover their nudity, shoes that were not for their feet, furniture they would not use in their huts. They, like you, built the houses, to sleep in the open air; laid the rails to go on foot; they grazed the cattle to live on herbs and roots; they chopped wood to shiver with cold.

Those rebels are your brothers. They are also awaited in the shack by a melancholic mother casting anxious looks along the dirty road; by a sad wife, by the loving sister, by the beloved daughter, the elderly father, the tender children, and those dear ones that make existence enchanting, the family, in a word, without whom we seem to lack something, we don't seem to be complete.

Those rebels are your brothers, only more intelligent than you are, they don't sacrifice themselves or their families to elevate a man to the Presidency who shall make the happiness of the humble, for experience, observation and the teachings of history have demonstrated that never in the life of humanity has the rare phenomenon been produced of a government that concerned itself for the well being of the poor classes, but all to the [69] contrary; it has always been seen that governments support the rich

as against the poor. You don't know why is that, you Carranza soldiers; but I will explain it to you in a few lines.

In the beginning, human beings had no government, then everything belonged to all; at that time the land—was free for anyone who wanted to work it; the forests supplied with wood and meat all those who cared to take the trouble to go and look for such things as necessary to life; the springs had no owner; all had an equal right to extract from the river, the lake or the sea, all the fishes they wanted. In that happy time there was no government, because there was no private property to protect, and people understood each other so well, that the greater part of all work was done in common, consumption was done in fraternity, everyone taking what he needed. But wars came of tribes against tribes and the vanquished were reduced to slavery, having then to work for their conquerors, who, naturally declared themselves owners of everything in existence. Then, Authority was born, there was privileges to protect; those of the conquerors over the conquered.

Here is how was born the principle of Authority, that had not as its origin, as generally supposed, the necessity of the weak defending themselves from the aggression of the strong, but the necessity of the strong to keep their riches safe from the possible aggressions on the part of the dispossessed.

If you, Carranza soldiers, have no material wealth to lose, it is bad for you to sacrifice yourself and those dear to you to elevate a man to the Presidency, who, as a ruler, will be your lash and your executor,

as he shall do nothing in your benefit, because in his mission is not to protect you from the aggressions of the strong, but to keep you subjected by means [70] of the law that the strong has made for his own protection, and not for yours.

The strong have the earth, the machinery of production, the houses, the means of transportation and distribution, of the prime material (*materia prima*) and of all manufactured things, and transportation, also of persons. All of that is what is called social wealth, and the possession of that wealth gives power to him that has it to play at his whim with the fate of him that has it not. That is why we, the anarchists who form the Mexican Liberal Party, do not fight to obtain an increase in wages, or a decrease in the hours of labor, nor for the indemnization of accidents, or for old age pensions, nor for any such things, but for the abolition of the right of private property which makes possible the gathering in a few hands of the social wealth. We want the social wealth to be the common patrimony of all the inhabitants of Mexico, men and women, without distinction of race or color.

All that as to salaries, more or less high, of indemnizations and so forth, can be easily acquired, because such things do not attach the right of private property which is the right to exploit and to keep the people in slavery. As long as the right of private property remains on foot, the same wrong that compelled you to take up arms will stand; misery, because it would do you good to have your wages raised and to be 'benefited' by the other reforms,

such as the diminution of the hours of labor, and others, if you have to pay a higher price for the necessities of life, and more for hours rent, to say nothing of contributions, which, if the government does not exact them from you in person, it will [71] exact them from your masters, who reimburse themselves by raising the prices of everything. You are the one who, in reality, pay the contributions, or taxes, not the bourgeois.

So you see, brother carrancistas, the problem which is going to be solved by the rebels who retain their arms, when Carranza becomes President, is the problem that you will have to decide because it affects you in the same manner.

Your duty is to help and for this purpose do not surrender your arms when the troops are ordered disbanded.

What you should do at such a time, or before if possible, is to rebel, turn your arms against your chiefs and officers and without trembling pulse open fire with your rifles, because they are your enemies and are concerned in having these conditions last forever, so they can have a life of privilege.

A strong heart, a firm pulse and steady aim is all you need to exterminate your immediate oppressors.

If you surrender your arms you will return to your home in poverty, ready to sell your blood and strength to the rich at their own price.

You will have accomplished nothing, but in the meantime your chiefs and officers will enjoy, in the city, all kinds of pleasures and honors, and display

on their breasts *and* crosses and medals. If you remain in the Carranza army as a permanent soldier you will be a bad man, and executioner of your brothers of your class because you will help to serve the rich.

Honor points to the road you should take; rebel against the government until you attain the triumphs of the principles comprised in the declaration of the 23d of September, 1911, expedited by the Mexican Liberal Party, principals that [72] advocate the death of capital, of authority and of clergy of all religions.

Decide to follow this road. Don't be deceived by the specious arguments of alleged wise politicians; these same arguments were used by the enemies of the great French Revolution to prevent the people from obtaining their political liberty.

It was the argument of Porfirio Diaz to prevent you from obtaining your liberties; it is also the argument of the Carranza party used to prevent you from obtaining your economic liberty, which is the foundation of all liberties.

This means the privilege of earning your living by working for yourself and being independent, and this can only be obtained, understand, by expropriation of land, houses, machinery, means of transportation and merchandise becoming common property, without distinction of men or women, race or color. He who tells you to the contrary, spit in his face and even kill him, because it is necessary, it is absolutely necessary, to initiate a revolutionary campaign of housecleaning.

We, the disinherited, must rid ourselves of those who are in our way, if we can, by hook or crook, the same as we get rid of a tiger, as we annihilate the rattlesnake, as we crush the tarantula.

Those who tell you that they are not prepared for this or other conquests which benefit you, are the ones who have interest in delaying your emancipation, so that in the meantime they can live at your expense.

Now, carrancista soldiers, to act as men convinced that there is nothing in common between the poor and the rich, unless it be the hatred that they mutually profess for each other, a hatred we must not try to lessen, but which precisely must be [73] deepened, exasperate it, increase it if it is possible, enliven it, poke it so that it shall not be extinguished, for the existence of that hatred between the two social classes, that of the exploited and that of the exploiters, is a guarantee of struggle and hope of emancipation for those who today are found in the last rung of the social ladder.

Long Live Land and Liberty!

RICARDO FLORES MAGON.

Here the defendant rested and the Government rested also, the foregoing being all the evidence offered or introduced by either party upon the trial of said cause.

And thereupon the Court charged the jury, as set out in the charge of the Court in the judgment-roll herein, which said charge of the Court as set out in the judgment-roll, comprises all the instructions given to the jury in said cause.

BE IT REMEMBERED FURTHER that the defendants requested certain instructions to be given by the Court which were refused and to the refusal to give each of the said instructions the defendants then and there duly excepted, said requested instructions are contained in the judgment-roll herein, and are hereby specifically referred to and made a part of this bill of exceptions.

Motion for New Trial.

And thereupon, the jury rendered a verdict of not guilty as to the first count in said indictment, and guilty as charged upon the second and third counts of said indictment, and thereupon the defendants, by their counsel, moved the Court for a new trial of said cause, the said motion for a new trial omitting the caption, being in words and figures as follows: to wit: [74]

“Now come the defendants Enrique Flores Magon and Ricardo Flores Magon, in their own proper person, and by counsel and move the court for a new trial herein for the following reasons, to wit:

1. Because the verdict is contrary to law.
2. Because the verdict is contrary to the evidence.
3. Because the evidence is insufficient to support the verdict.
4. Because the verdict is against the weight of the evidence.
5. Because the Court erred in refusing to give to the jury defendant's requested instructions numbers two, three, five, six, eight, nine, eleven and twelve.
6. Because the Court erred in denying the defend-

ants' motion to require the Government to elect as to which court the Government would first proceed to trial on.

7. Because the Court erred in denying the motion of the defendants for a separate trial.

8. Because the Court erred in sustaining the objection of the Government to the following question propounded to the defendant Enrique Flores Magon, upon direct examination, to wit, 'At the time you deposited, or caused to be deposited in the mail, the alleged nonmailable matter set out in the second and third counts of the indictment, did you know such matter to be of a character tending to incite murder or assassination?'

9. The Court erred in sustaining the objection of the Government to the following question propounded to the defendant Enrique Flores Magon, in direct examination, to wit: 'At the time that you deposited, or caused to be deposited in the mail the objectionable matter set out in counts two and three of [75] said indictment, did you intend to deposit in the mail indecent matter, that is to say, matter of a character tending to incite murder or assassination?'

10. Because the Court erred in instructing the jury that one who writes nonmailable matter for a newspaper, being neither its editor, manager, owner or publisher, is criminally responsible for the transmission of such matter through the mails.

11. Because the Court erred in failing to instruct the jury as to the meaning of the word "Assassination" as used in Section 211, P. C. as amended.

WHEREFORE, the defendants pray that the verdict be set aside, and a new trial granted herein.

J. H. RYCKMAN,
Attorney for Enrique Flores Magon and Ricardo
Flores Magon."

which said motion was denied by the Court, to which ruling of the Court the defendants and each of them then and there duly excepted and thereupon the defendants moved the Court to arrest judgment upon the said verdict, which said motion, omitting the caption was and is in figures as follows, to wit:

Motion in Arrest of Judgment.

"Now come the defendants Enrique Flores Magon and Ricardo Flores Magon, each for himself, after verdict and before sentence, and move the Court that judgment be arrested herein as to each of said defendants, for the following reasons, to wit:

I.

Because the facts stated in the second count of said indictment do not constitute an offense against the United States.

II.

Because the facts stated in the third count of said indictment do not constitute an offense against the United States. [76]

III.

Because the alleged nonmailable matter set out in the second count of said indictment is not of a character tending to incite murder or assassination.

IV.

Because the alleged nonmailable matter set out in

the third count of said indictment is not of a character tending to incite murder or assassination.

V.

Because the alleged nonmailable matter set out in the second count of said indictment is neither vile, nor filthy nor of an indecent character.

VI.

Because the alleged nonmailable matter set out in the third count of said indictment is neither vile, nor filthy, nor of an indecent character.

VII.

Because it is not alleged in either the second or third counts of said indictment that the alleged objectionable matter was nonmailable.

VIII.

Because it is not alleged in either the second or third counts of said indictment that the newspaper, or newspapers containing said alleged objectionable matter were addressed to any person, or persons whomsoever, nor is it alleged in either of said counts that the address or addresses of the persons or persons to whom said newspaper or newspapers were to be delivered by the postoffice establishment were to the grand jurors unknown.

IX.

Because it is not alleged in said indictment that these [77] defendants, or either of them, knew that the newspapers, or any of them alleged to have been deposited by them in the postoffice, contained indecent matter, nor is it alleged that the defendants, or either of them knew the import of said alleged indecent matter, nor that they, or either of them, knew

that said matter was of a character tending to incite murder or assassination, nor is it alleged in said indictment that these defendants, or either of them were the owners, or managers, or editors, or publishers of said newspaper, from which it could be inferred that they knew said newspapers contained indecent matter or matter tending to incite murder or assassination.

X.

Because in the second count of said indictment an indefinite number of distinct offenses are charged against these defendants, and each of them.

XI.

Because in the third count of said indictment an indefinite number of distinct offenses are charged against these defendants, and each of them.

XII.

Because the said indictment in the second and third thereof, is not direct or certain as regards the offense charged.

XIII.

Because the said indictment in the second and third counts thereof, is not direct or certain as to the particular circumstances and the offense charged, and that said particular circumstances are necessary to constitute a complete offense.

XIV.

Because said indictment in the second and third counts [78] thereof, does not contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable

a person of common understanding to know what was intended.

XV.

Because it was not intended by Congress in amending Section 211 of the Penal Code by the act of March 4th, 1911, defining the term "Indecent" as used in said section 211, P. C., to include matter of a character tending to incite arson, murder or assassination, thereby to deny the use of the mails to Mexicans or others resident in the United States, in agitating for political reforms in Mexico, or elsewhere, nor was it intended by Congress by such amendment to limit or curtail in any wise the rights of Mexican people resident here or elsewhere in their efforts for the social, industrial, or political amelioration of their condition, nor is it competent for Congress to make any law under subdivision 7 of Sec. VIII, of Art. I of the constitution infringing the first amendment to the constitution.

XVI.

Because the term "indecent" as defined by Congress in the amendment of March 4th, 1911, applies only to matter of a character tending to incite arson, murder or assassination among those whose minds are open to such influences, and there is no allegation in said indictment that the alleged nonmailable matter was addressed to any such person, or persons.

XVII.

Because said indictment is void for uncertainty.

WHEREFORE, the defendants, and each of them, pray that judgment herein may be arrested.

J. H. RYCKMAN,

Attorney for Enrique Flores Magon and Ricardo Flores Magon.” [79]

whereupon said motion in arrest of judgment was denied by the Court in the words following, to wit:

Order Denying Motion in Arrest of Judgment.

“I presume it has been conceded that this is the first case that has been prosecuted under the amended law as adopted on 1909. Now, reference has been made in the argument here to the abridgment of free speech and a free press. It has been held that this law as it was before it was amended is within the constitution, and if the Government (Congress) has a right to prohibit the sending of obscene and lewd and lascivious matter through the mails, Congress certainly has the power to prohibit sending through the mails matter which has a tendency to the destruction of the Government. I, for my individual self, am not in sympathy with parts of section 211 in regard to trying to reform the morals of the entire community—every community in the United States—by prosecuting people for the misuse of the post-office. If I had been a member of Congress in the enacting of such laws, I should have opposed them. I don’t believe that morals ought to be reformed through the postoffice. These prosecutions for fraud orders, people using the postoffice to defraud people, do not have my sympathy at all.

I think this amendment, Mr. Ryckman, is better for the Government than these other enactments of

section 211; that is to say, as long as we have government, it is the duty of the Government to preserve itself, and that is necessary, that every government should have laws to preserve itself. The most severe laws in every government are the laws against treason. Of course, when a government is overthrown, those who were at one time guilty of treason become patriots and noble men. Jefferson and Paine, those men to whom you have referred, were regarded as traitors; men who primarily sought to overthrow the government of England, of course, would all have been executed if the [80] Revolution had not been successful. The King of England would not have been executed except Cromwall was successful, and if Cromwell had not been successful, he would have been executed.

And so it goes. It is the duty of every government to preserve itself. Now, I think this law prohibiting the sending of matter through the mails which would have a tendency to destroy the order and administration of the laws, is a wholesome law in the interest of the government; that is the way I look at it. Now, you say that the postoffice is a government monopoly. Yes, it is. The constitution provides for it. And yet there are in this country a great many people who are not satisfied with the government having that one monopoly, but they want the government to have all the monopolies; the government to take over the railroads and express companies and all means of transportation in the United States. It may be that you can't send such matter as this even by express or freight, or disseminate it in that way. It

is up to the government; if they take over these things, they have a right to regulate them.

I don't know, I am not speaking about the wisdom of such laws, or whether they are good or bad, but I do not propose in my remarks to follow you through all you have said. I think that Mr. Ryckman made a brilliant defense of these defendants. You presented their case well to the jury; you presented it in every way well; I think you may be proud of the defense you have made of these defendants. In your remarks you have referred to Tom Paine, and you have referred in your address to the jury to an article Tom Paine wrote named 'The Crisis.' I may have gotten confused as to where the various things contained in his writings appear. I have read them all with great pleasure, but I think it is in 'The Crisis' in which he wrote, when he was a soldier in [81] the Revolutionary army—wrote, I believe, on the head of a drum, and in that remark he said, 'This is no time for sunshine soldiers.' Now, it seems to me that these defendants have got no right to come under the American Flag, a flag that is supposed to be the grandest emblem of freedom in all the world, and they have got no right to come here and do things that may involve this country into a war with Mexico. They have got no right to seek the protection of the American flag in order to fight the battles they may have in Mexico. They have been here now for sixteen years, the evidence in this case shows, at all the times in trouble with this Government, violating its laws. They have got no right to do that; they are aliens to this country; they are

aliens to our people; I think it would be very much more becoming of them if they would be down there in Mexico with a musket fighting for their rights, as they claim, or fighting for whatever they want to fight for instead of doing things that at the present time indicates may get us into trouble, and God forbid that we may have it.

I said a while ago that I was not going to follow you through your remarks. I think these men have been prosecuted justly, by a just complaint; they have been tried by a good jury and well defended; I don't think there is any error in the record. Your motion will be overruled."

to which ruling of the Court, the defendants and each of them then and there duly excepted.

And forasmuch as the evidence and proceedings and matters of exception above set forth do not fully appear of record, the defendants Enrique Flores Magon and Ricardo Flores Magon, by their attorney tenders this bill of exceptions and pray that the same be signed and sealed by the Court here, pursuant [82] to the statute in such case made and provided;

Which is done accordingly this 20th day of September, A. D. 1916.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: Original. No. 1071—Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. Enrique Flores Magon, and Ricardo Flores Magon,

Defendants. Bill of Exceptions. Rec'd. copy this Aug. 2d. 1916. Albert Schoonover, U. S. Atty. Filed Aug. 2, 1916, at — min. past — o'clock — M. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Approved and filed Sept. 27, 1916, Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. J. H. Ryckman. Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California, Home A-4533, Main 5247, Attorney for Defendants. [83]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1071—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Defendants.

Bond of Ricardo Flores Magon.

KNOW ALL MEN BY THESE PRESENTS:
That I, Ricardo Flores Magon, as principal, and Mathilde S. Forrester, Chauncey D. Clarke and Reuben T. Forrester, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of three thousand dollars, payment of which, well and truly to be made, we bind ourselves and our heirs, executors and administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of June, 1916.

Whereas, at a regular term of the United States District Court, in and for the Southern District of California, Southern Division, on June 22d, 1916, in a suit wherein the United States of America was plaintiff, and the said Ricardo Flores Magon et al., were defendants, a judgment and sentence were rendered against the defendant Ricardo Flores Magon; and the said defendant has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence in the aforesaid suit and proceeding, and a citation directing the United States of America to be [84] and appear in the said United States Court of Appeals for the Ninth Circuit at San Francisco, California, sixty days from and after the date of said citation, which citation has been duly served.

Now, the condition of this obligation is such that if the said Ricardo Flores Magon shall appear, either in person or by attorney, in the said Circuit Court of Appeals on such date or dates as may be appointed for the hearing of the said cause in said court, and prosecute his writ of error, and shall abide by all the orders made by said Circuit Court of Appeals, and shall surrender himself in execution and will satisfy the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed, then this obli-

gation to be void; otherwise to be and remain in full force and effect.

RICARDO FLORES MAGON,

Principal.

MATHILDE S. FORRESTER, (Seal)

CHAUNCEY D. CLARKE, (Seal)

REUBEN T. FORRESTER, (Seal)

Sureties.

Signed, sealed and acknowledged before me this 24th day of June, 1916.

[Seal]

D. M. HAMMOCK,

U. S. Commissioner of the United States District Court, in and for the Southern District of California, Southern Division.

Examined and approved this 26th day of June, 1916.

OSCAR A. TRIPPET,

Judge. [85]

State of California,

Los Angeles County,—ss.

We, Mathilde F. Forrester, and Chauncey D. Clarke, being duly sworn, each for himself and not one for the other, do swear that they are each worth the sum of three thousand dollars, over and above all debts and liabilities and exclusive of exemptions under the laws of this State, and that said property on which we base our worth is in this State and County.

CHAUNCEY D. CLARKE.

MATHILDE S. FORRESTER.

Subscribed and sworn to before me this June 24, 1916.

[Seal]

D. M. HAMMOCK,
United States Commissioner, Southern District
California.

State of California,
Los Angeles County,—ss.

I, Reuben T. Forrester, being duly affirmed, do solemnly and sincerely affirm under the pains and penalties of perjury, that I am worth the sum of three thousand dollars, in property in said County, over and above my debts and liabilities.

REUBEN T. FORRESTER.

Subscribed and solemnly affirmed before me, this June 24, 1916.

[Seal]

D. M. HAMMOCK,
U. S. Commissioner, Southern District California.

[Endorsed]: Original. No. 1071—Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, Plaintiff, vs. Enrique Flores Magon and Ricardo Flores Magon, Defendants. Bond of Ricardo Flores Magon. Filed June 26, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. J. H. Ryckman, [86] Lawyers, Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California, Home A-4533, Main 8533, Attorney for Defendants. [87]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 1071—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Defendants.

Bond of Enrique Flores Magon.

KNOW ALL MEN BY THESE PRESENTS:
That I, Enrique Flores Magon, as principal, and
C. F. W. Richard Bruns and Marie R. Clarke, as
sureties, are held and firmly bound unto the United
States of America, in the full and just sum of five
thousand dollars, payment of which, well and truly
to be made, we bind ourselves, our heirs, executors
and administrators and successors, jointly and sev-
erally, by these presents.

Sealed with our seals and dated this 1st day of
July, 1916.

Whereas, at a regular term of the United States
District Court, in and for the Southern District of
California, Southern Division, on June 22d, 1916,
in a suit wherein the United States of America was
plaintiff, and the said Enrique Flores Magon et al.,
were defendants, a judgment and sentence were ren-
dered against the defendant Enrique Flores Magon;
and the said defendant has obtained a writ of error

from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence in the aforesaid suit and proceeding, and a citation directing the United States of America to be and [88] appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of this obligation is such that if the said Enrique Flores Magon shall appear, either in person or by attorney, in the said Circuit Court of Appeals on such date or dates as may be appointed for the hearing of the said cause in said court, and prosecute his writ of error, and shall abide by all the orders made by said Circuit Court of Appeals, and shall surrender himself in execution and will satisfy the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed, then this obligation to be void; otherwise to be and remain in full force and effect.

ENRIQUE FLORES MAGON, (Seal)

Principal.

C. F. W. RICHARD BRUNS, (Seal)

Surety.

MARIE R. CLARKE, (Seal)

Surety.

Signed, sealed and acknowledged before me this
1st day of July, 1916.

[Seal] D. M. HAMMOCK,
Commissioner of the United States District Court,
in and for the Southern District of California,
Southern Division.

Examined and approved this 1st day of July, 1916.

OSCAR A. TRIPPET,

Judge. [89]

United States of America,
State of California,
County of Los Angeles,—ss.

I, C. F. W. Richard Bruns, of lawful age, being
duly sworn, do solemnly swear that I am a free-
holder of said county; that I am worth the sum of
\$5,000 over and above all debts and liabilities and
exclusive of exemptions under the laws of this State,
and that I am the owner in my own name of unen-
cumbered real property in said County of the value
of \$5,000.

C. W. F. RICHARD BRUNS.

Subscribed and sworn before me this 1st day of
July, 1916.

[Seal] D. M. HAMMOCK,
United States Commissioner, Southern District of
California.

United States of America,
State of California,
County of Los Angeles,—ss.

I, Marie R. Clarke, of lawful age, being duly af-
firmed, do solemnly and sincerely affirm under the
pains and penalties of perjury that I am a freeholder

in said County and that I am worth the sum of \$5,000 over and above my debts, liabilities and exemptions and that I am the owner of unencumbered real estate in said County in my own name of the value of \$5,000.

MARIE R. CLARKE.

Subscribed in my presence and solemnly affirmed before me this 1st day of July, 1916.

[Seal]

D. M. HAMMOND,

United States Commissioner, Southern District of California. [90]

[Endorsed]: Original. No. 1071-Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, Plaintiff, vs. Enrique Flores Magon and Ricardo Flores Magon, Defendants. Bond of Enrique Flores Magon. Filed Jul. 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. J. H. Ryckman. Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California. Home A-4533. Main 5247. Attorney for Defendants. [91]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 1071—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Defendants.

Petition for Writ of Error.

Your petitioners Enrique Flores Magon and Ricardo Flores Magon, defendants in the above-entitled cause, feeling themselves aggrieved by the judgment herein, come now by J. H. Ryckman, their attorney, and petition the Court for an order allowing the defendants to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States, and in that behalf your petitioners say:

That on June 22d, 1916, there was made, given and rendered in this cause, a judgment against your petitioners, whereby your petitioners were adjudged and sentenced to imprisonment at McNeil's Island upon each of the second and third counts of the indictment, to run concurrently as follows: Enrique Flores Magon, three years and to pay a fine of \$1,000, and Ricardo Flores Magon one year and a day, and to pay a fine of \$1,000.

Your petitioners say that they are advised by their counsel and therefore aver that there was, and is manifest error in the records and proceedings had in said cause, and in the making, giving and entry of such judgment and sentence to the [92] great injury and damage of your petitioners, and that each and all of said errors will be more fully made to appear by an examination of said records, and by an examination of the bill of exceptions to be hereafter by your petitioners, tendered and filed and of the assignment of errors to be hereinafter set out, and to the end that the judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners pray that a writ of error may issue, directed therefrom to the said District Court of the United States, for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto, a copy of the record, bill of exceptions, assignment of errors, and all proceedings had, and to be had in said cause, and that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioners. And your petitioners make the assignment of errors attached hereto upon which they, and each of them will rely and which will be made to appear by a return of said record in obedience to said writ, a more full assignment to be attached to the bill of exceptions to be hereafter prepared.

WHEREFORE, these defendants pray that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of; that the assignment of errors filed herewith may be considered as their assignment of errors upon the writ; that a transcript of the records, proceedings, papers and bill of exceptions herein duly authenticated may be sent to the said [93] United States Circuit Court of Appeals for the Ninth Circuit, and that the judgment rendered in this cause may be reversed; that the defendants be awarded a supersedeas; that the defendants be admitted to bail and that the Court fix the amount of said bail, and the amount of the security which the defendants shall give upon said writ of error, and that all further proceedings in this court be suspended and stayed until the termination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

ENRIQUE FLORES MAGON.

RICARDO FLORES MAGON.

J. H. RYCKMAN,

Attorney for Defendants.

Allowed: Bond —

_____,
Judge.

State of California,

County of Los Angeles,—ss.

Enrique Flores Magon and Ricardo Flores Magon, being by me first duly sworn, each for himself depose and say: That they are the defendants in the above-

entitled action; that they have heard read the foregoing Petition for Writ of Error, and know the contents thereof; and that the same is true of their own knowledge, except as to the matter which are therein stated upon their information or belief, and as to those matters that they believe it to be true.

ENRIQUE FLORES MAGON.

RICARDO FLORES MAGON.

Subscribed and sworn to before me this 22 day of June, 1916.

[Seal]

RALPH J. DOMINGUEZ,

Notary Public in and for the County of Los Angeles,
State of California. [94]

[Endorsed]: Original. No. 1071—Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, Plaintiff, vs. Enrique Flores Magon and Richardo Flores Magon, Defendants. Petition for Writ of Error. Filed Jun. 22, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. J. H. Ryckman, Lawyers, Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California, Home A-4533, Main 8533, Attorney for Defendants. [95]

*In the District Court of the United States in and
for the Southern District of California, South-
ern Division.*

No. 1071—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ENRIQUE FLORES MAGON and RICARDO
MATON,

Defendants.

Assignment of Errors.

Come now the defendants Enrique Flores Magon and Ricardo Flores Magon by their counsel J. H. Ryckman and file the following assignment of errors upon which they will rely upon their prosecution of the writ of error in the above-entitled cause from the order and judgment made by this Honorable Court, on the 22d day of June, 1916, in the above-entitled cause.

1. That the Court erred in overruling the defendants' demurrer to the indictment.

2. That the Court erred in overruling the demurrer of the defendants to the second count of the indictment.

3. That the Court erred in overruling the demurrer of the defendants to the third count of the indictment.

4. That the Court erred in denying the defendants' motion to quash the indictment.

5. That the Court erred in denying the defend-

ants' motion in arrest of judgment.

6. That the verdict is contrary to law.

7. That the verdict is contrary to the evidence.

8. That the verdict is contrary to the law and the evidence. [96]

9. That the evidence is insufficient to support the verdict.

10. That the verdict is against the weight of the evidence.

11. That the Court erred in denying the defendants' motion to require the Government to elect as to which count the Government would first proceed to trial upon.

12. That the Court erred in denying the motion of the defendants for a separate trial.

13. That the Court erred in refusing to give to the jury defendants' requested instructions numbers 2, 3, 5, 6, 8, 9, 11, and 12.

14. That the Court erred in sustaining the objection of the Government to the following question propounded to the defendant Enrique Flores Magon, upon direct examination, to wit: "At the time you deposited, or caused to be deposited in the mail, the alleged nonmailable matter set out in the second and third counts of the indictment, did you know such matter to be of a character tending to incite murder or assassination?"

15. That the Court erred in sustaining the objection of the Government to the following question propounded to the defendant Enrique Flores Magon, in direct examination, to wit: "At the time that you deposited, or caused to be deposited in the mail

the objectionable matter set out in counts two and three of said indictment, did you intend to deposit in the mail the indecent matter, that is to say, matter of character tending to incite murder or assassination?"

16. That the Court erred in instructing the jury that one who writes nonmailable matter for a newspaper, being neither [97] its editor, manager, owner or publisher, is criminally responsible for the transmission of such matter through the mails.

17. That the Court erred in not instructing the jury to return a verdict of not guilty.

J. H. RYCKMAN,

Attorney for Enrique Flores Magon and Ricardo Flores Magon.

[Endorsed]: Original. No. 1071-Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. Enrique Flores Magon and Ricardo Flores Magon, Defendants. Assignment of Errors. Filed June 22, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. J. H. Ryckman, Lawyers, Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California, Home A-4533, Main 8533. Attorneys for Defendants. [98]

*In the District Court of the United States in and
for the Southern District of California, South-
ern Division.*

No. 1071—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ENRIQUE FLORES MAGON AND RICARDO
FLORES MAGON,

Defendants.

Order Allowing Writ of Error.

Upon motion of J. H. Ryckman, attorney for the defendants Enrique Flores Magon and Ricardo Flores Magon, and upon filing of the petition for writ of error and assignment of errors, it is ordered that a writ of error be, and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein; that pending the decision upon the said writ of error the *supersedeas* prayed for by the defendants in the petition for a writ of error herein is hereby allowed, and the defendants Enrique Flores Magon and Ricardo Flores Magon are admitted to bail upon said writ of error in the sum of \$5000 as to Enrique Flores Magon, and \$2000 as to Ricardo Flores Magon, and the bond for costs upon the writ of error is hereby fixed at the sum of Three Hundred Dollars.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: Original. No. 1071—Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, Plaintiffs, [99] vs. Enrique Flores Magon and Ricardo Flores Magon, Defendants. Order Allowing Writ of Error. Filed Jan. 22, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. J. H. Ryckman, Lawyers, Suite 921 Higgins Building, Second and Main Sts., Los Angeles, California, Home A-4533, Main 8533, Attorney for Defendants. [100]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1071—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Defendants.

Praeceptum for Record on Appeal.

To the Clerk of said Court:

Please make true copies of the following for record on appeal:

1. The indictment;
2. The petition for writ of error;
3. The assignment of errors;
4. The writ of error;
5. The citation to writ of error;

6. The defendants' requested instructions numbers 2, 3, 5, 6, 8, 9, 11 and 12, refused by the Court;
7. The verdict of the jury;
8. The judgment of the Court;
9. The bill of exceptions.

J. H. RYCKMAN,

Attorneys for Defendants.

[Endorsed]: Original. No. 1071—Criminal. In the District Court, etc., The United States of America, Plaintiff, vs. Enrique Flores Magon and Ricardo Flores Magon, Defendants. Praeipie [101] for Record on Appeal. Filed Sept. 29, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. J. H. Ryckman, 920 Higgins Bldg., Los Angeles, Cal., Attorney for Defendants. [102]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 1071—CRIMINAL.

Plaintiffs,

vs.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Defendants.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing One Hundred and Two (102) type-

written pages, numbered from 1 to 102 inclusive. and comprised in one volume, to be a full, true and correct copy of the Indictment, Verdict, Instructions requested by Defendants, Judgment and Sentence, Bill of Exceptions, Bond of Ricardo Flores Magon, Bond of Enrique Flores Magon, Petition for Writ of Error, Assignment of Errors, Order Allowing the Writ of Error, and the Praecipe for Record on Writ of Error in the above and therein Entitled Action, and that the same together constitute the record in said action as specified in the said Praecipe filed in my office on behalf of the Plaintiffs in Error by their attorney of record.

I do further certify that the cost of the foregoing record is \$51.40 the amount whereof has been paid me by Enrique Flores Magon and Ricardo Flores Magon, the plaintiffs in error herein. [103]

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 18th day of December, in the year of our Lord one thousand nine hundred and sixteen and of our Independence the one hundred and forty-first.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America in and for the Southern District of California. [104]

[Endorsed]: No. 2901. United States Circuit Court of Appeals for the Ninth Circuit. Enrique Flores Magon and Ricardo Flores Magon, Plaintiffs

in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed December 26, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial District.*

No. 1071-CRIMINAL.

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Order Enlarging Time to October 1, 1916, to File
Record and Docket Cause.**

Good cause appearing therefor, IT IS ORDERED, that the time heretofore allowed said plaintiffs in error to docket said cause and file the records thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged to and including the 1st day of October, 1916.

Dated, Los Angeles, California, June 30th, 1916.

OSCAR A. TRIPPET,

United States District Judge, Southern District of
California.

[Endorsed]: Original. No. 1071—Criminal. In the United States Circuit Court of Appeals, Ninth Judicial District. Enrique Flores Magon and Ricardo Flores Magon, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Order Enlarging Time.

No. 2901. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to October 1, 1916 to File Record Thereof and to Docket Case. Filed Jul. 3, 1916. F. D. Monckton, Clerk. Refiled Dec. 26, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

(No. 1071—CRIM.)

ENRIQUE FLORES MAGON and RICARDO
FLORES MAGON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Order Enlarging Time to December 31, 1916, to File
Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered that the time of plaintiffs in error within

which to file record and docket cause in the above-entitled court be, and the same hereby is extended to and including the 31st day of December, 1916.

Dated, Sep. 20, 1916.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: No. 2901. United States Circuit Court of Appeals for the Ninth Circuit. Enrique Flores Magon and Ricardo Flores Magon, Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Under Rule 16 Enlarging Time to Dec. 31, 1916 to File Record Thereof and to Docket Case. Filed Oct. 2, 1916. F. D. Monckton, Clerk. Refiled Dec. 26, 1916. F. D. Monckton, Clerk.

2901.

No. ~~2018~~

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Enrique Flores Magon and
Ricardo Flores Magon,

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

J. H. RYCKMAN,

917-919 Higgins Bldg., Los Angeles, Cal.,

Attorney for the Plaintiffs in Error.

Filed

MAY 19 1917

E. D. Monckton,

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Enrique Flores Magon and
Ricardo Flores Magon,

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The plaintiffs in error hereinafter called the defendants, were indicted February 18, 1916, with another William C. Owen, for violating that portion of section 211 of the Penal Code which forbids the sending of "indecent" matter through the mails, to-wit, matter of a character tending to incite murder or assassination. Section 211 of the Penal Code was originally enacted by Congress in 1872 as Sec. 3893 R. S. It declared written or printed matter of an obscene, lewd lascivious or other indecent character or anything designed to prevent conception or procure abortion as non-mailable.

By the act of March 4, 1911, it was amended by adding these words: "And the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder or assassination." As far as known this is the first prosecution under the statute as thus amended. The defendants demurred to the indictment. The demurrer was overruled. They also moved to quash. This motion was denied. They were acquitted on the first count. They were convicted on the second and third. They moved in arrest of judgment. This being denied they were sentenced to prison at McNeil Island, Enrique to three years and Ricardo to one year and a day, and to pay a fine of \$1000.00 each on each count. They sued out a writ of error and were released on bail pending the hearing on the writ.

The evidence showed that the defendants were born in Mexico, were educated in the City of Mexico, and have been engaged since reaching manhood, a period of upwards of twenty years, in publishing papers here and in Mexico in opposition to the rule of Porfirio Diaz and his successors in that unhappy country. Enrique admitted that he owned the newspaper "Regeneration" and printed and published the same at Los Angeles, containing the alleged non-mailable matter set out in the indictment and Ricardo admitted that he was a writer on such newspaper and wrote the objectionable articles.

The indecent matter alleged in the second count, written by the defendant Ricardo Magon in Spanish and printed in Spanish in Regeneration September

25, 1915, translated into English is as follows [Tr. pp 9, 10, 66, 70]:

“Justice, and not bullets is what ought to be given to the revolutionists of Texas, and from now on we should demand that those persecutions to innocent Mexicans should cease, and as to the revolutionists, we should also demand that they be not executed (shot).

“The ones who should be shot are the ‘rangers’ and the band of bandits who accompany them in their depredations.

* * * * *

“Enough of reforms! What we hungry people need is entire liberty based on economic independence. Down with the so-called rights of private property, and as long as this evil right continues to exist we shall continue under arms. Enough with mockery! Poor people, whoever speaks to you about Carranzismo, spit in their face and break their jaws.

“Long live land and liberty!”

The indecent matter alleged in the third count, written by the defendant Ricardo Magon in Spanish and printed in Spanish in *Regeneration* November 6, 1915, was addressed “To Carrancista Soldiers.” The gist of it translated into English is as follows [Tr. pp. 14, 16, 74, 75, 76]:

“So you see, brother Carrancistas, the problem which is going to be solved by the rebels who retain their arms, when Carranza becomes president, is the same problem that you will have to decide because it affects you in the same manner. Your duty is to help and for this purpose do not surrender your arms when

the troops are ordered disbanded. What you should do at such a time, or before, if possible, is to rebel, turn your arms against your chiefs and officers and without trembling pulse open fire with your rifles, because they are your enemies, and are concerned in having these conditions last forever, so they can have a life of privilege.

“A strong heart, a firm pulse and steady aim is all you need to exterminate your immediate oppressors.

“If you surrender your arms you will return to your home in poverty, ready to sell your blood and strength to the rich at their own price.

“We, the disinherited, must rid ourselves of those who are in our way, if we can, by hook or crook, the same as we get rid of the tiger, as we annihilate the rattlesnake, as we scrunch the tarantula. Those who tell you that they are not prepared for this or other conquests which benefit you are the ones who have interest in delaying your emancipation so that in the meantime they can live at your expense.”

SPECIFICATIONS OF ERROR.

1. The facts stated in the second count do not constitute an offense.

2. The facts stated in the third count do not constitute an offense.

3. The statute is void for uncertainty under the well-known maxim: “*Ubi jus incertum, ibi jus nullum*,” and the indictment is therefore void for uncertainty.

4. It is not competent for Congress to make any law under subdivision 7 of Sec. VIII of Art. I of the constitution infringing the first amendment.

5. It is not competent for Congress to say that the word "indecent" as used in Sec. 211 P. C. shall comprehend matter of a character tending to incite murder or assassination.

6. The matters and things set out in the second and third counts as having been printed and published in *Regeneration* are not of a vile or filthy or indecent character nor of a character tending to incite murder or assassination.

7. The indictment does not allege that the objectionable matter was non-mailable.

8. The indictment does not allege that the newspaper or newspapers containing the indecent matter were addressed to any person or persons whomsoever, nor that the names of such persons were unknown to the grand jury.

9. The indictment does not allege that the defendants, or either of them, knew that said newspapers so mailed contained indecent or vile or filthy matter or matter tending to incite murder or assassination, nor that the defendants, or either of them, were the owners or managers or editors or publishers of such newspaper from which it could be inferred that they knew such matter was indecent or vile or filthy or of a character tending to incite murder or assassination.

10. The term "indecent," as defined by Congress by the amendment of March 4, 1911, applies only to matter of a character tending to incite arson, murder or assassination among those whose minds are open to such influences and there is no allegation that the alleged indecent matter was addressed to any such person or persons, nor that it tended to incite murder

or assassination, but only that such matter "was of a character tending to incite in the minds of persons reading the same murder and assassination."

11. The court erred in sustaining the objection of the Government to the following question propounded to the defendant Enrique Flores Magon, upon direct-examination, to-wit: "At the time you deposited, or caused to be deposited in the mail, the alleged non-mailable matter set out in the second and third counts of the indictment, did you know such matter to be of a character tending to incite murder or assassination?"

12. The court erred in sustaining the objection of the Government to the following question, propounded to the defendant Enrique Flores Magon, in direct examination, to-wit: "At the time that you deposited, or caused to be deposited in the mail objectionable matter set out in counts two and three of said indictment, did you intend to deposit in the mail the indecent matter, that is to say, matter of character tending to incite murder or assassination?"

13. The court erred in instructing the jury that one who writes non-mailable matter for a newspaper, being neither its editor, manager, owner or publisher, is criminally responsible for the transmission of such matter through the mails.

14. The court erred in refusing to give to the jury defendants' requested instructions numbers 2, 3, 5, 6, 8, 9, 11 and 12, as found on pages 18, 19, 20, 21, 22 and 23 of the transcript.

BRIEF OF THE ARGUMENT.

I.

The indictment is void for uncertainty in that it charges that the objectionable matter contained in the second and third counts of the indictment is of a character tending to incite in the minds of persons reading the same murder and assassination. This language is too vague to form the basis of a criminal charge involving such heavy penalties.

Schroeder Due Process of Law, 49;

Enterprise, Fed. Cas. No. 4499;

U. S. v. Clayton, Fed. Cas. No. 14814;

Tozer v. U. S., 52 Fed. 917, 919;

Louisville & N. R. Co. v. Railroad Com. of
Tenn., 16 Am. & Eng. R. Cas. 15;

Louisville & N. R. Co. v. Com., 35 S. W. 129,
33 L. R. A. 209, 212;

Chicago & C. R. Co. v. Dey, 35 Fed. 866, 1 L.
R. A. 744, 750;

Bish. Stat. Cr. Sec. 41;

Sutherland, Stat. Const. 1st ed., 438-9;

U. S. v. Reese, 92 U. S. 219, 221, 23 L. 563,
363;

U. S. v. Sharp, Fed. Cas. No. 16264;

U. S. v. Traction Co., 34 App. Cas. (D. C.)
592;

Czarra v. Medical Supers., 25 App. Cas. (D. C.)
443;

McJunkins v. State, 10 Ind. 145;

Ex parte Andrew Jackson, 45 Ark. 164;

U. S. v. Commerford, 25 Fed. 904;

- 2 Hughes Procedure, 1003;
- 1 The Spirit of the Law, 232, Aldine ed.;
- King v. Dean of St. Asaph, 3 Terms Rep. 431.

II.

The indictment is bad because:

- a. It does not allege that the objectionable matter was non-mailable, nor that
- b. It was addressed to any person or persons whomsoever to be delivered through the mails, nor that
- c. The defendants knew it to be non-mailable.
 - U. S. v. Brazeau, 78 F. 464;
 - U. S. v. Hess, 124 U. S. 483, 31 L. 516;
 - Evans v. U. S., 153 U. S. 584, 38 L. 830;
 - U. S. v. Taylor, 37 F. 200;
 - Goode v. U. S., 159 U. S. 671;
 - Sec. 5467, 5 Fed. Stat. 839;
 - Durland v. U. S., 161 U. S. 306, 314, 40 L. 709, 712;
 - U. S. v. Green, 136 F. 641;
 - Hughes, Fed. Proc. p. 38;
 - U. S. v. Fero, 18 F. 901;
 - Peters v. U. S., 94 F. 127, 36 C. C. A. 105;
 - Cochran v. U. S., 157 U. S. 286, 39 L. 704;
 - U. S. v. Cruikshank, 92 U. S. 542, 23 L. 588;
 - U. S. v. Harris, 122 F. 551;
 - U. S. v. Clifford, 104 F. 296;
 - 2 Hawk, P. C. p. 323, Sec. 60;
 - State v. Foster, 3 McCord 442;
 - Republica v. Foyer, 3 Yeates 451;
 - U. S. v. Bebout, 28 F. 522;

U. S. v. Slenker, 32 F. 691;
U. S. v. Clifford, 104 F. 296;
U. S. v. Carll, 105 U. S. 611, 26 L. 1135;
U. S. v. Cruikshank, 92 U. S. 542, 23 L. 588;
Corn v. Boynton, 12 Cush 499;
Com. v. Young, 15 Grat. 664;
U. S. v. Reid, 73 F. 289;
Rosen v. U. S., 161 U. S. 29, 40 L. 607;
1 Jones Evidence, Sec. 167;
1 Bish. Crim. Proc. Sec. 1184;
Kerrains v. People, 69 N. Y. 101;
U. S. v. Stone, 8 F. 232;
12 Cyc. 403.

III.

That the indictment does not state facts sufficient to constitute an offense and that the defendants could not have known that the language used by them was indecent or of a character tending to incite murder or assassination. [Tr. pp. 60 to 75, inclusive; Tr. pp. 48 to 60, inclusive.]

IV.

It is not competent for Congress to enact any law under subdivision 7 of Sec. 8 of Art. I of the constitution, infringing the first amendment.

Reynolds v. U. S., 98 U. S. 163, 25 L. 249;
Scott v. Sandford, 19 How. 393, 15 L. 691;
Gulf etc. Ry. Co. v. Ellis, 165 U. S. 160, 41 L.
670.

THE ARGUMENT.

I.

The Indictment Is Bad for Uncertainty.

There ought to be absolute certainty in the definition of that which is penalized. Wherever the interpretation, construction and application of a penal statute are left to the judge or to the jury for want of a definition of the thing prohibited, for lack of definite criteria of guilt, such statute is void for uncertainty. The case at bar affords a fine example. The learned trial judge who heard the demurrer held that the first count as well as the second and third contained matter of a character tending to incite murder or assassination. The jury held that the first count was not of a character to incite murder or assassination.

“The rule by which such statutes must be annulled is this: that every statute penal in character is void for uncertainty unless the prohibited conduct and criteria of guilt are defined in the statute by words so fixed and certain in meaning as to leave no reasonable doubt or difference of opinion in the minds of men of ordinary intelligence as to what is prohibited or as to the consequence of applying the statutory criteria of guilt to every given state of facts. If the statutory test of criminality is uncertain and therefore left to be judicially supplied so that in a given case a uniform conclusion is not unavoidably reached by different courts acting upon the same state of facts, which uniformly must be reached solely by accurate, unavoidable and uniform deduction made from the statutory tests of criminality (not by

tests judicially created) then the statute is a nullity."

Schroeder Due Process of Law, 49.

To pass the question up to 12 men in the jury box to say whether certain words such as are contained in the second and third counts tend to incite to murder or assassination is to violate every principle by which we have conceived our most precious liberties to be safeguarded, and no less imperils freedom than when the same question is left to the discretion of the judge.

In May and June, 1916, when this case was tried this country was on the verge of war with Mexico and the president had sent an expeditionary force across the border to capture Villa dead or alive. There was much feeling in this country against Mexicans. Who can say, with no criteria of guilt prescribed in the statute, to what extent the jury was unconsciously moved by the outrages on our border, to adjudge the defendants guilty? Another jury in less troublous times might have said "Not guilty," and in either case by what legal standard could it be adjudged that one verdict was right and the other wrong? *Ubi jus incertum, ibi jus nullum.*

"For although ignorance of the existence of a law be no excuse for its violation, yet, if this ignorance be the consequence of an ambiguous or obscure phraseology some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. * * * A

court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused."

Enterprise, Fed. Cas. No. 4499.

"The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactment, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. * * * The doctrine is fundamental in English and American law that there can be no constructive offenses; that before a man can be punished, his case must be plainly and unmistakably within the statute; that if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles admit of no dispute, and often have been declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States."

U. S. v. Clayton, Fed. Cas. No. 14814.

"In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

Tozer v. U. S., 52 Fed. 917, 919.

Courts have uniformly held penal statutes void for uncertainty, not due process of law, and therefore unconstitutional when it was left to judge or jury to construe such terms and phrases as "fair and just return" or "just and reasonable rate of toll or compen-

sation" and to determine the defendants' guilt under statutes penalizing transportation companies for charging too much in the transportation of passengers or freight. In a leading case the Court of Appeals of Kentucky referred to the Tozer case with approval and said:

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions, on the same testimony as to whether or not an offense has been committed, must also be conceded. That criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged, and this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so, as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can

be known until after the commission of the crime.

“If the infliction of the penalties prescribed by the statute would not be the taking of property without due process of law, and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic laws. In *Louisville & N. R. Co. v. Railroad Com. of Tenn.*, 16 Am. & Eng. R. Cas. 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): ‘Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a “fair and just return” on its investments it must, in order to the validity of the law, define with reasonable certainty what would constitute such “fair and just return.” The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know, in advance of a verdict, whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent, while another might acquit an accused who had demanded and received at the rate of 6 per cent, rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms.’ When we look on the other side of the question, we find the contention of the state supported by neither reason or authority. No case

can be found, we believe, where such indefinite legislation has been upheld by any court when a crime is sought to be imputed to the accused."

Louisville & N. R. Co. v. Com., 35 S. W. 129,
33 L. R. A. 209, 212.

Just as in the case at bar different juries would have different opinions as to what language in a newspaper article would tend to incite to murder or assassination, so in these rate cases different juries would have different opinions as to what was a fair and reasonable rate. And the learned Judge Hazelrigg in the case last cited further says:

"In such case it may be seen different persons have different opinions as to what is a fair and reasonable rate. Courts and juries too would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which, in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be thought otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with the purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed."

In one of the early rate cases arising in Iowa in 1888, the statute imposed heavy penalties without clearly defining the offenses.

Mr. Justice Brewer said:

"The contention of complainant is that the substance of these provisions is, that if a railroad

company charges an unreasonable rate, it shall be deemed a criminal, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find, to be a reasonable charge. If this were the construction to be placed upon the act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and may not do under it."

The learned justice then remarks :

"That it is impossible to dissent from the doctrine of Lord Coke that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters."

He then refers to the Chinese Penal Code which reads :

"Whoever is guilty of improper conduct and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least 40 blows; and when the impropriety is of a serious nature with 80 blows," adding "There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate."

Chicago & C. R. Co. v. Dey, 35 Fed. 866, 1
L. R. A. 744, 750.

And with propriety may we not remark also that there is very little difference between the Chinese statute and our section 211 P. C., leaving it to a jury to say what words upon paper, what language in writing *tends to incite* murder or assassination. The notable

difference is that the Chinese law deals with a trifling misdemeanor involving an extreme penalty of 80 blows, while under our statute the unhappy accused may suffer imprisonment for five years and be fined \$5,000.

“Where the statutory terms are of such uncertain meaning or so confused that the courts cannot discern with reasonable certainty what is intended they will pronounce the enactment void.”

Bish. Stat. Cr. Sec. 41.

“The penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to its justice and humanity that it be expressed in language which they can easily comprehend, that it be held obligatory only in the sense in which all can understand it, and this consideration presses with increasing weight according to the severity of the penalty. Hence every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation.
* * * It is the legislature, not the court, which is to define a crime and ordain its punishment.”

Sutherland, Stat. Const., 1st ed., 438-9.

Edward Livingston was one of the greatest lawyers, jurists and statesmen of this time. He was secretary of state under Jackson, minister to France, and United States senator.

In 1821 he was employed by the state of Louisiana to draft a Penal Code. Sir Henry Maine pronounced him “the first legal genius of modern times.” In 1822, speaking of the times of Jeffreys, he said:

This dreadful list of judicial cruelties was increased by the legislation of the judges who declared acts, which were not criminal under the letter of the law, to be punishable by reason of its spirit. The statute gave the text and the tribunals wrote the commentary in letters of blood, and extended its penalties by the creation of constructive offenses. The vague, and sometimes unintelligible language, employed in the penal statutes, gave a color of necessity to this assumption of power, and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies, quartered for constructive treason, and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. The first constructive extension of a penal statute beyond its letter, is an *ex post facto* law, as regards the offense to which it is applied, and is an illegal assumption of legislative power, so far as it establishes a rule for further decisions. In our republic, where the different departments of government are constitutionally forbidden to interfere with each other's functions, the exercise of this power would be particularly dangerous. * * *

It may be proper to observe that the fear of these consequences is not ideal, and that the decisions of all tribunals under the common law justify the belief that without some legislative restraint our courts would not be more scrupulous than those of other countries, in sanctioning this dangerous abuse. It is better that acts of an evil tendency should for a time be done with impunity than that courts should assume legislative powers, which assumption is itself an act more injurious than

any it may purport to repress. There are therefore no constructive offenses. Penal laws should be written in plain language, clearly and unequivocally expressed, that they may neither be misunderstood or perverted."

In a leading case Chief Justice Waite said:

"If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. * * * It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the court to step inside and say who could be rightfully detained, and who should be set at large. This would to some extent substitute the judicial for the legislative department of the government."

U. S. v. Reese, 92 U. S. 219, 221, 23 L. 563, 565.

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

U. S. v. Sharp, Fed. Cas. No. 16264.

"In a criminal statute the elements constituting an offense must be so clearly stated and defined as to reasonably admit of but one construction. The dividing line between what is lawful and unlawful cannot be left to conjecture."

U. S. v. Traction Co., 34 App. Cas. (D. C.) 592;
Czarra v. Medical Supers., 25 App. Cas. (D. C.)

Many courts have wrestled in vain endeavoring to define such words as “obscene” and “indecent” in penal statutes. It remained for Congress to apotheosize absurdity by declaring that the word “indecent” shall include matter of a character tending to incite murder or assassination.

The great jurist Edward Livingston, in framing his criminal code above referred to, exclaimed in despair that he had serious thoughts to omit such matters altogether because of the impossibility of defining them and leave them to correction by public opinion.

At an early day the highest court of Indiana in discussing the term “indecent” said:

“It would therefore appear that the term ‘public indecent’ has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense. And hence, the courts, by a kind of judicial legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person, the publication, sale or exhibition of obscene books and prints, or the exhibition of a monster,—acts which have a direct bearing on public morals, and effect the body of society. Thus it will be perceived that so far as there is a legal meaning attached to the term, it is different from and more limited than the commonly accepted meaning given by Webster to the word indecent. A statute relative to a misdemeanor of the grade and character of this, and prescribing so severe a penalty as the deprivation of liberty by imprisonment, ought to be clearly worded, so as to leave no doubt or ambiguity about its meaning, before it should be construed to include a large and undefined class of offenses

against morality. * * * This statute, under such circumstances, should be in itself explicit, and should not depend for vitality upon another act defining the meaning of words. * * * If the statute is given the broad construction contended for by the prosecution, who is to determine what phrases amount to an offense under it?"

McJunkins v. State, 10 Ind. 145.

In construing the term "obscene" in Sec. 211, Judge Lowell of the Eastern District of Massachusetts said:

"Crime should be so clearly defined that there can be no mistaking it. Murder, homicide, arson, larceny, burglary, forgery, are so defined that they cannot be misunderstood. If obscenity is a crime punishable by fine and imprisonment it ought to be so clearly described that we may know in what it consists, and that accused persons may not be at the mercy of a man, or a number of men who construe what is obscene, indecent or immoral by their own special opinion or notion of morality or immorality. What is obscene to one man may be pure as mountain snow to another. One man should not and cannot decide for other men."

So, in the case at bar, what to one man would tend to incite murder might to another be a perfectly legitimate expression of righteous indignation or a mere ardor of sentiment or at most a verbal indiscretion or only a piece of rant or harmless levity or innocuous braggadocio.

The Supreme Court of Arkansas, construing a statute denouncing "any act injurious to the public health or public morals," said:

"We cannot conceive how a crime can, or any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who comprise the court or jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The constitution which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge or jury after the act had been committed."

Ex parte Andrew Jackson, 45 Ark. 164.

Touching an obscenity statute, the United States court for the Western District of Texas has said:

"We have been taught to believe that it was the greatest injustice toward the common people of Old Rome when the laws they were commanded to obey, under Caligula, were written in small characters, and hung upon high pillars, thus more effectually to ensnare the people. How much advantage may we justly claim over the old Romans, if our criminal laws are so obscurely written that one cannot tell when he is violating them? If the rule contended for here is to be applied to the defendant, he will be put upon trial for an act which he could not by perusing the law have ascertained was an offense. My own sense of justice revolts at the idea. I cannot give

it my sanction. * * * The indictment is quashed, and the defendant is discharged.”

U. S. v. Commerford, 25 Fed. 904.

“Where the law is uncertain, there is no law.” This maxim was born of the solicitude of our fathers to conserve our liberties. Speaking of maxims, a leading law writer says:

“All great judges and writers have been led by maxims. * * * Where the maxims lead and illumine the great ends of jurisprudence have been advanced; constitutions and their implications have been respected. Judges who understand, respect and cite maxims, save great principles from clouds of doubt and miserable equivocation. * * * Nothing more greatly obstructs usurpation, abuse of power and arbitrariness in its edicts than do maxims. * * * Maxims are the condensed good sense of all nations. They are the essence of wisdom in all ages. Whenever the law is the perfection of reason, they are not excluded but they must necessarily be included. Jurisprudence can lay claim to no other element so lustrous, so illuminating and attractive, as its great fundamental maxims.”

2 Hughes Procedure, 1003.

And of this particular maxim he says:

“Where the rule is alternating, as antipathy and affection, caprice or whim dictates, there is no law. And so it is where for one of the foundations for a judgment must be one kind of matter, and for another, a different.”

It is conceded that Montesquieu was the inspiration of the fathers of the constitution. It is interesting, and we hope not unprofitable, in this connection to note from the voluminous legal literature of that time what he and other distinguished jurists had to say about certainty in penal statutes. Discoursing of treason, and his words aptly apply to such an offense as using language tending to incite murder, Montesquieu said:

“Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches. Speech is so subject to interpretation; there is so great a difference between indiscretion and malice; and frequently little is there of the latter in the freedom of expression, that the law can hardly subject people to a capital punishment for words unless it expressly declares what words they are. Words do not constitute an overt act; they remain only in idea. When considered by themselves, they have generally no determinate signification, for this depends on the tone in which they are uttered. It often happens that in repeating the same words they have not the same meaning; this depends on their connection with other things, and sometimes more is signified by silence than by any expression whatever. Since there can be nothing so equivocal and ambiguous as all this, how is it possible to convert it into a crime of high treason? Wherever this law is established, there is an end not only of liberty, but even of its very shadow.”

I The Spirit of the Law, 232 Aldine ed.

So Beccaria, one of the greatest of legalists, says:

“When the rule of right which ought to direct the actions of the philosopher, as well as the

ignorant, is a matter of controversy, not of fact, the people are slaves to the magistrate. If the power of interpreting laws be an evil, obscurity in them must be another, as the former is the consequence of the latter. I do not know of any exception to this general axiom, that every member of society should know when he is a criminal and when innocent. The uncertainty of crimes hath sacrificed more victims to secret tyranny, than have ever suffered by public and solemn cruelty."

Lord Auckland in 1771, writing on the principles of penal law, said:

"It is further essential to political freedom that the laws be clearly obvious to common understanding, and fully notified to the people. * * * When the people first learn the law by fatal experience, they feel as if the judge was in effect legislator, and as if life and liberty were subjected to arbitrary control. * * * The same will be the consequences where the law is imperfectly and indefinitely expressed. The style thereof should be clear, and as concise as is consistent with clearness; general terms also should be particularly avoided, as liable to become the instruments of oppression."

In 1784 a high English court, denouncing uncertainty in the law of libel, said:

"Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law (or which is the same thing), no certain administration of law, to protect individuals or to guard the state. * * * Under such an administration of the law no man could tell, no counsel could advise, whether a paper were or were

not punishable. I am glad that I am not bound to subscribe to such an absurdity, such a solecism in politics."

King v. Dean of St. Asaph, 3 Terms Rep. 431.

These citations make it clear that the very essence of the terms "law," "law of the land" and "due process of law," as used in our constitution and in the controlling decisions of our Supreme Court is that all discretion of judge and jury in criminal cases is taken away by the very explicitness of the law itself and when that explicitness is lacking the law is uncertain and there is no law. *Ubi jus incertum, ibi jus nullum.*

II.

Technical Defects.

The argument thus far is designed to have application especially to the third specification of error averring uncertainty in the definition of the offense charged. If this contention is sound the indictment fails for uncertainty as it necessarily does not state facts sufficient to constitute an offense, and the argument reaches specifications of error Nos. 1, 2 and 6 also. Further argument is reserved, however, under the third subdivision hereof bearing upon the point that the objectionable language cannot be construed as of a character to incite murder or assassination under the circumstances of the case and under the constitutional guarantees of the first amendment, and in view of the fact that Congress has no power in regulating the postoffice to infringe freedom of speech or of the press when such freedom is dependent upon the use of the

postoffice and when such freedom would be but a mockery without the use of the mails. We now proceed to a consideration of specifications of error Nos. 7, 8 and 9, points raised in the motion to quash, to-wit, that the indictment does not allege the objectionable matter was non-mailable, nor that it was addressed to any person, nor that the defendants knew it was indecent.

Specification of Error No. 7.

There is no averment in the indictment that the newspapers, or any of them, alleged to have been deposited in the postoffice by the defendants, to be transmitted by the postoffice establishment were addressed to any person or persons nor that the names of the addressees were unknown.

This is a fatal defect and cannot be cured by verdict. An allegation that the newspapers were addressed or that direction was given for mailing or delivery is requisite, not as a matter of description or identification of the unmailable article, but as an averment of an essential ingredient of the offense; and such ingredient is not supplied by the general averment that the newspapers were deposited to be transmitted and distributed by the postoffice establishment to many and divers persons whose names are to the grand jurors unknown.

U. S. v. Brazeau, 78 F. 464.

In the Brazeau case the indictment was under Sec. 3893, as amended by Act of Sept. 26, 1888, charging the defendant with depositing 100 copies of a newspaper containing an obscene article in the postoffice

“for mailing and delivery,” but without any averment that such newspapers were addressed to any person or persons whomsoever. The Government claimed that the address is a mere matter of description and that the newspapers were sufficiently identified and described otherwise than by the address, and that the essential ingredients of the offense were sufficiently set forth in the language of the statute. District Judge Brown held against the Government. He said:

“The rule that an indictment following the words of the statute is sufficient is subject to the qualification that all material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication and the charge must be made directly and not inferentially.”

Citing:

U. S. v. Hess, 124 U. S. 483, 31 L. 516;
Evans v. U. S., 153 U. S. 584, 38 L. 830.

The learned judge further says:

“The statute does not make criminal the mere depositing in a postoffice of obscene matter. The substance of the offense is the employment of, or the attempt to employ, the mails for the transmission of obscene matter. The depositing prohibited by this statute is depositing ‘for mailing and delivery.’ There must be a purpose or intent in the act of depositing and an adaptation, apparent at least in the thing deposited to effect that intent. A newspaper without address or direction for de-

livery is not even apparently capable of effecting that intent. So long as anything remained to be done to make the newspapers a proper subject of deposit in the mail or at least an apparently proper subject of deposit so as to put in motion the postal operations of mailing or delivery, the offense was incomplete.”

Citing:

U. S. v. Taylor, 37 F. 200;

Goode v. U. S., 159 U. S. 671, 40 L. 297.

In the Taylor case the defendant was convicted of embezzling a letter under

Sec. 5467, 5 Fed. Stat. 839.

At the trial the court held the delivery of the registry receipt and the payment of the registration fee were sufficient evidence that the thing embezzled was a letter. There was no evidence that the letter was ever stamped or sealed or put in the special envelope used for registered letters. On motion for a new trial the court held it was not a “letter”—that as long as anything remained to be done to render the envelopeailable matter, i. e. a proper subject of deposit in the mail the postmaster was acting merely as the agent of the sender and the envelope was not a letter within the meaning of the statute.

The court further says:

“The only language which by any possibility can be considered as including an allegation that the newspapers were capable of mailing is the averment that they were deposited ‘for mailing and delivery.’ But in the case at bar there is not

even such an allegation in the language of the statute, but only this: That defendants did * * * deposit and cause to be deposited in the postoffice * * * certain mail matter, to-wit, a newspaper containing indecent, vile and filthy substance and language * * * and said newspaper of said indecent character was so deposited and caused to be deposited in the postoffice (not by the defendants, mark you, or either of them) to be transmitted to many and divers persons * * * the names of which divers persons are unknown to the grand jurors, and many copies of said newspapers were so deposited and caused to be deposited (not by the defendants, or either of them) in the postoffice at one time and as one act to be so distributed by said postoffice and delivery respectively a copy each to said many and divers persons."

I may well further adopt the language of the learned Judge Brown and say:

"But this is not a direct and certain allegation. To give it the required construction, resort must be had to inference and to the illogical inference that because the newspapers were deposited for a certain purpose, they were deposited under such conditions as to be capable of effecting that purpose. Such an inference is not only unsound, but a violation of the rule quoted from U. S. v. Hess, even granting the contention that the address, if added, would be simply additional description of the thing deposited and serve merely for identification. Is not such a description required by the rule that there should be such reasonable particularity in the description as the nature of the case admits? The universal practice

of adding such averments and the well-known course of the operation of the postoffice afford sufficient evidence of the practicability of the description. To sustain this indictment is practically to establish a precedent for the total omission from indictments of this class of any reference to the envelope or address of letters or newspapers and for relaxing the present practice of setting forth in the indictment the address. As a chief ingredient in crimes of this class is a direction to the postal authorities to mail and deliver the article; as this direction is usually, if not invariably contained in a written instrument, i. e., the envelope or wrapper; as the established practice of skilled criminal pleaders is to set out this instrument or at least to aver that the article was addressed to persons known or unknown, it seems unwise and unjust to persons charged with offenses against the operations of the postoffice to countenance indictments in the present unprecedented form."

Citing:

Durland v. U. S., 161 U. S. 306, 314, 40 L. 709,
712.

In the Durland case it was held that the omission to state names and addresses was satisfied by the allegation, if true, that they are unknown.

The Brazeau case is referred to with approval in the celebrated case of

U. S. v. Green, 136 F. 641,
involving bribery of Government officials under Sec. 5451. There were very able counsel on both sides (Stanchfield, Collin and Tuthill) before District Judge

Ray, N. D. N. Y. He cites the Brazeau case in support of the proposition from

Hughes' Fed. Proc. p. 38,

where it is said:

“In statutory offenses the language of the statute may be followed, but this does not dispense with the necessity of setting out the specific elements of the offense itself with sufficient definiteness to put the prisoner on his defense and to enable him to protect himself from a second prosecution.”

Citing also:

U. S. v. Fero, 18 F. 901;

Peters v. U. S., 94 F. 127, 36 C. C. A. 105;

Cochran v. U. S., 157 U. S. 286, 39 L. 704;

U. S. v. Cruikshank, 92 U. S. 542, 23 L. 588.

The learned Judge Hawley, in

U. S. v. Harris, 122 F. 551,

refers to the Brazeau case and says: “The correctness of that opinion as applied to the facts of that particular case will not be questioned.” The Harris case involved a non-mailable letter with no averment that it was enclosed in an addressed envelope, but the letter was set out and the address and the name of the addressee given.

Specification of Error No. 8.

Because the indictment is further defective in that it contains no averment that the newspapers were non-mailable; the indictment must charge specifically that the publication mailed was of the character declared

non-mailable by the statute, and it is not sufficient merely to set out a copy of such publication, leaving its non-mailable character to be inferred therefrom; nor is the defect cured by the conclusion, "contrary to the form of the statute."

U. S. v. Clifford, 104 F. 296, citing 2 Hawk,
P. C., p. 323, Sec. 60;

State v. Foster, 3 McCord, 442;

Respublica v. Foyer, 3 Yeates, 451,

on the point that the want of direct allegation of anything material in the description of the substance, nature or manner of the crime cannot be supplied any intendment or implication whatsoever.

Specification of Error No. 9.

It is not averred in the indictment that defendants, or either of them, knew that the papers alleged to have been deposited by them in the postoffice contained indecent matter or knew its import, or that it was of a character tending to incite murder or assassination, nor any averment that the defendants, or either of them, were the owners or managers or editors or publishers of such papers from which it could be inferred that they knew the papers contained indecent matter or matter tending to incite murder or assassination.

U. S. v. Bebout, 28 F. 522;

U. S. v. Slenker, 32 F. 691;

U. S. v. Clifford, 104 F. 296.

In the Bebout case, Judge Wilken, in charging the jury, said: "To authorize a conviction of the defend-

ants it must be shown that they knew at the time that the paper contained the article or objectionable matter set out in the indictment. This knowledge is essential to constitute the offense. If they did not know that the matter described was in the paper, then the offense is not made out and they are entitled to an acquittal."

In the Slenker case Judge Paul, on motion in arrest of judgment, granted the motion and said: "*The scienter*, when necessary to be alleged in the indictment, is matter of substance, and not of form, and its omission is not cured by Sec. 1025.

The district attorney insists that as the indictment is in the language of the statute it is sufficient. This is the general rule as to sufficiency in describing the offense; but where something more is necessary, such as the allegation of guilty knowledge, then the language of the statute is not always sufficient. (The language of the statute is not used in this indictment.) This was the case in

U. S. v. Carll, 105 U. S. 611, 26 L. 1135, where the indictment alleged in the words of the statute that the defendant feloniously and with intent to defraud did pass, utter and publish a falsely made, forged and counterfeited and altered obligation of the United States, but did not allege that the defendant knew it to be false, forged, counterfeited and altered. It was held insufficient after verdict, the Supreme Court saying:

"In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless the words of themselves fully, di-

rectly and expressly, without any uncertainty or ambiguity, set forth all elements necessary to constitute the offense to be punished.”

To the same effect is the decision in

U. S. v. Cruikshank, 92 U. S. 542, 23 L. 588.

The same objection made to this indictment was made and sustained in the case of

Com. v. Boynton, 12 Cush. 499.

These authorities are as high as any that can be invoked in the decision of this question. A very clear rule as to the sufficiency of an indictment is laid down in

Com. v. Young, 15 Grat. 664.

It is this:

“If the indictment may be true and still the accused may not be guilty of the offense described in the statute, the indictment is insufficient. Let us apply this rule to the case before us. The defendant is charged with knowingly depositing and causing to be deposited in the mail for mailing and delivery certain obscene papers. He may have knowingly done this, he may knowingly have caused it to be done, and yet be entirely ignorant of the obscene character of the writings, etc., so deposited, and consequently not guilty of the offense described in the statute. Knowingly in the indictment must be limited to the act of depositing for mailing and delivery of the obscene matter in the mail, and cannot be extended to include a guilty knowledge of the writings, papers, etc.”

In the Clifford case, *supra*, the demurrer was sustained on two grounds,—no averment of non-mailability or of *scienter*. On the latter point Judge Jackson said:

“The mere depositing of a paper is not of itself a violation of law. It is the depositing and mailing of a paper with knowledge of its contents, such as is described in the statute, which constitutes the violation of the law. The indictment should allege that when the defendant deposited the paper he knew of its contents and that it contained an article the mailing of which was inhibited by the statute. It does not necessarily follow that the depositing of a paper by the defendant renders him liable in the absence of guilty knowledge of its contents. If it is necessary to secure the conviction of a man for violation of this statute, by proof that the paper contained matter inhibited by the statute, then he should have notice of what the prosecution intended to prove by an allegation in the indictment that he well knew its contents, and that the paper contained matter forbidden by the statute to be mailed.”

Judge Jackson then cites the case of

U. S. v. Reid, 73 F. 289,

where Judge Severens quashed the indictment under Sec. 3893, because it contained no averment of *scienter*. The learned Judge Severens thought the defect would probably be regarded as waived after verdict, but on motion to quash, lack of such allegation was fatal. He said:

“It is undoubtedly an element of the offense prescribed by the statute that the party charged

must have known the character of the publication when it was deposited by him in the mail, and the ground of the present objection is that it is nowhere charged in this indictment that the respondent had such knowledge."

The last word on this point is contained in

Rosen v. U. S., 161 U. S. 29, 40 L. 607,

where Justice Harlan said:

"Undoubtedly the mere depositing in the mail of a writing, paper or other publication of an obscene, lewd or lascivious character is not an offense under the statute if the person making the deposit was at the time and in good faith without knowledge, information or notice of its contents."

In closing this phase of the discussion, and before proceeding to the final contention, we call attention to Specifications of Error Nos. 11 and 12 and 5 and 10.

Scienter, as herein discussed, necessarily comprehends intent, and intent is an element of the offense charged that it was "knowingly and wilfully" done. It was prejudicial error on the part of the trial judge not to permit the defendant Enrique Flores Magon to answer the questions as to whether he knew his paper to contain matter tending to incite murder or assassination or whether he intended to deposit in the mail indecent matter.

"Whenever the motive, intention or belief of a person is relevant to the issue it is competent for such person to testify directly upon that point. When the motive of a witness in performing a particular act becomes a material issue in a

cause or reflects important light upon such issue, he may himself be sworn in regard to it."

1 Jones Evidence, Sec. 167;

1 Bish. Crim. Proc., Sec. 1184;

Kerrains v. People, 69 N. Y. 101;

U. S. v. Stone, 8 F. 232;

12 Cyc. 403.

As to the extraordinary meaning attached by Congress to the word "indecent" by the amendment of March 4, 1911, it is only necessary to say that it is so whimsical, capricious, unreasonable and arbitrary that this Honorable Court ought to have no hesitation in saying that the enactment is nugatory and the amendment void. Such a definition altogether transcends the power of Congress, and is so uncontrolled by law, so unsanctioned by linguistic usage, so philologically impossible, and so opposed to the sound traditions of our mother tongue as to be void upon its face. The dictionaries give the synonyms of "indecent" as indelicate, immodest, gross, shameful, impure, indecorous, obscene, filthy, unbecoming, unseemly, improper, but no intimation of such a meaning as attached to the word by Congress.

Further, it may be said, apropos of Specification No. 10, that the great Lord Cockburn, having in mind that profound maxim that to the pure all things are pure, wisely observed that the test was whether the tendency of such matter was to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands such matter may fall. There is no such allegation in the indictment and it is therefore

fatally defective on this point alone and the judgment should have been arrested.

Our courts have uniformly followed Lord Cockburn in construing Sec. 211 P. C. exclusive of the amendment of March 4, 1911.

III.

Did the Defendants Know or Could They Have Known That the Printed Matter Claimed in the Indictment to Be Non-Mailable Was "Indecent" or That It Was "of a Character Tending to Incite, in the Minds of Persons Reading the Same, Murder and Assassination" in the Language of the Indictment, or of a Character Tending to Incite Murder or Assassination in the Language of the Statute?

The defendants introduced in evidence the whole of the articles appearing in their paper *Regeneracion*, containing the alleged indecent matter,

[Tr. pp. 60 to 75, inclusive]

and the manifesto of the Mexican Liberal party,

[Tr. pp. 48 to 60, inclusive]

written and published September 23, 1911, by the defendants and others interested in the liberation of Mexico, for the purpose of showing the court and the jury that the defendants were engaged, as they conceived it, in the laudable endeavor to bring about some amelioration of the horrible social, industrial and political conditions in the country of their birth. This certainly is a laudable purpose. Patriots and lovers of liberty in all ages and in all lands have so labored.

The manifesto of September 23, 1911, is an historic document. It rings with lofty idealism. It urges the solidarity of the working class. It exhorts to unity of action. So do the articles as a whole containing the objectionable matter in the indictment. The question for the court to decide is whether such language is "indecent," i. e., tends to incite murder or assassination. If it is, then consistency requires that nearly every editor of the newspaper press in the United States be prosecuted. It would be easy to fill a hundred pages of this brief with recent instances of much more objectionable matter appearing in newspapers of high repute and big circulation. Many such have doubtless come to the attention of the members of this Honorable Court in the course of their reading the daily press. As I write I cull this from a daily paper of wide circulation published in Los Angeles:

"The preparedness that the nation demands and that Southern California especially needs is a preparation of cavalry, infantry and artillery to hurl back the conglomerated host of German reservists and Mexican bandits that threaten our southern frontier, and drive them below the south line of Chihuahua and Sonora and take the country and annex and rule it."

In 1525 the peasants of southern Germany rose against their rulers as the peasants of Mexico have been in revolt against their rulers for more than half a century. In that year Martin Luther wrote a pamphlet to encourage the revolt. He said:

"In the first place we have no one to thank for such disorder and rebellion but you, princes and lords,

and especially you blind bishops and crazy monks and priests, who, stubborn unto this day, have not ceased to rave and rage against the blessed Gospel, even though you know it is right and that you cannot refute it. Moreover, in your worldly offices you do nothing but skin and tax in order to keep up your pride and splendor, till the common man neither can nor will endure it longer. The sword is at your throats, yet you think you are so firm in the saddle that you cannot be unhorsed."

From that day to this such words, and others a thousand times more fiery, advising and justifying regicide, tyrannicide and resistance to tyranny, have lit the pages of history and inspired the hearts of men, and there is no historic case where the occasion or necessity for strong words has been greater than in the case of our sister republic. Mexico is one of the garden spots of earth. In minerals it is one of the world's rarest treasure houses. Here nature has been most beneficent. Her rulers have wrought her ruin. They have betrayed their trust, and Mexico lies torn and bleeding at the feet of those sworn to nurture and defend her. The land has been sold to the foreigner. The people have been robbed of their patrimony and despoiled and expropriated of all they possessed.

Millions of peons in Mexico have never known anything but oppression by the ruling class, exploitation by the capitalist class and persecution by the church—that sombre trinity referred to in the evidence in this case as capital, authority and the clergy, notwithstand-

ing the prodigality of nature in Mexico and the best Constitution ever written.

The cry for justice died on the lips of millions and was only made audible to the ear of humanity by the protests of such men as these defendants, who dared the powers that bound them, defied authority and languished and died in jail and on the gibbet that Mexico might be free. The land question lies at the base of Mexico's troubles. As early as 1856 the Mexican Congress passed the most advanced land law ever formulated. It declared: The right of property in land consists in the occupation or possession of land, and these legal requisites cannot be conferred unless the land be worked and made productive. The accumulation in the hands of a few people of large territorial possessions which are not cultivated or made productive is against the common welfare and contrary to the principles of democratic and republican government. The next year this liberal land law was embodied in the most advanced constitution ever adopted by any people in the history of the world, written by an Indian and received with acclamation by the common people. It guaranteed: "To every man as much land as he can make productive." It said: "The Mexican people recognize that the rights of men are the foundation and the purpose of social institutions; every one is born free; none shall be compelled to work without his consent or without just compensation, nor contract away, curtail or lose his liberty; the press, speech and education shall be free; monastic orders are not permitted; no church nor re-

ligious institution nor minister of any cult shall have legal capacity to acquire or hold or manage any land, nor shall any religion be established or recognized by Congress."

The church opposed the Constitution and this land policy. The people were commanded by the church "not to obey the government, but to work against it by all possible means," for it was said "such a government represented the enemies of religion, who were attacking the independence and sovereignty of the church, trying to subdue her temporal power, disposing her of her property and compelling her, with imprisonment and exile, to bow before an idol raised up by impiety." The church declared to the people that it was not lawful to swear allegiance to the Constitution, because it was contrary to the doctrines of the church. Those who had taken the oath of allegiance to the government of the Constitution were required to retract such oath at the confessional and to make such retraction public and to notify the government of their action. The Pope issued a bull deploring the curtailment of the church's privileges and said:

"We make known to the faith in Mexico and to the Catholic universe that we energetically condemn every decree that the Mexican government has enacted against the Catholic religion, against the church and her sacred ministers and pastors, against her laws, rights and property, and also against the authority of the Holy See. We raise our pontifical voice with apostolic freedom before you to condemn, reprove and declare null and void and without any value the said

decrees and all others which have been enacted by the civil authorities in such contempt of the ecclesiastical authority of this Holy See and with such injury to religion, to the sacred pastors and illustrious men.”

Progress and reaction here met face to face, each a challenge to the other, and Mexico has been torn and bleeding ever since in consequence. The church taught the people to spit upon the law and upon this splendid Constitution and to trample it beneath their feet. Throughout the trial counsel for the government at every opportunity thrust it into the case that the defendants are anarchists. Pray who taught the people of Mexico anarchy? Who taught them to spurn their Constitution and to defy the civil authorities? Let the church and Zuloaga and Miramon and Diaz answer.

And the hostility of the church to the civil institutions of Mexico has not abated in all the years of strife. There is the same fierce opposition on the part of the clergy to the liberal Constitution and to the liberal element in the government that there has always been.

In 1820 the church property in Mexico was \$45,000,000, according to an article in the New York Evening Mail of April 9, 1917, over the signature of Monsignor Kelley and endorsed by Archbishop Ireland. Speaking of a portion of the middle class upon whom he would lay the blame for Mexico's ills, he says:

“In reality these are either members of the Latinized Masonic lodges or people who follow the lead of such

lodges. Some of them are Socialists, always of the bitterest kind; some are out-and-out anarchists. They make up in noise what they lack in numbers. They have at different times, through agitation among the lowest class, imposed themselves and their opinions upon the entire middle class, of whom they form a very small proportion. * * * Government is always in the hands of a small political section of the middle class, absolutely unfitted for holding power, since their education consists of half-formed theories based chiefly on the ideals of the French revolution. * * *

“We know that man fighting against man often becomes a sort of human brute; but quite often, too, becomes more merciful and humane than the onlookers. In Mexico, home of the most ghastly spectacle of all time, it is not man who fights against man. It is man who fights against God, against all that religion means to a people. In Mexico there is on the fight of hell against heaven.”

Since this case was tried there has been published an illuminating book, “The Whole Truth About Mexico,” by Francisco Bulnes, for thirty years a representative and senator in the Congress of Mexico. Briefly summarized, this remarkable book makes the following indictment against the rulers of Mexico and against American and English capitalists:

1. Selling half of Lower California for a mere pittance to Louis Huller, of German extraction and a naturalized American citizen, who passed it on to an American colonizing enterprise.

2. The government gave its consent to changes in the mining code, for no other reasons than that of enriching the grantees of unclaimed lands in the state of Coahuila, who had acquired the Sabina lands for an insignificant sum with a view of selling them to the American multimillionaire, Huntington.

3. Selling, for next to nothing, 7,400,000 acres of excellent lands in the state of Chihuahua to two favorites of the Mexican government, that they might resell to Hearst, the millionaire newspaper publisher, who constantly conspired against the integrity of Mexican territory so as to bring about armed intervention.

4. Granting concessions to foreign companies to exploit the oil lands, among which companies the American predominated; granting them also exemption from export duties on the crude or refined product.

5. The most scandalous of all the oil concessions was that granted by the dictatorship to Lord Cowdray, an English capitalist. Lord Cowdray was intimately associated with ex-President Taft's administration, as his brother, Henry W. Taft, and George Wickersham, attorney general in the Taft cabinet, were directors in the Pearson company, organized and presided over by Lord Cowdray.

6. Permitting the Guggenheims to monopolize almost completely the important metallurgic industry. The Guggenheims controlled the smelting plants of Monterey, San Luis Potosi, Aguascalientes and Velardena, in Durango, and were getting a foothold in Pachuca and Real del Monte.

7. Granting to Col. Greene, an American citizen, enormous concessions in the copper lands of the state of Sonora, upon which he established the famous Cananea plant, where 4,000 employes were treated like slaves, and with such inhumanity that there was an uprising among them, with the result that armed men from the United States passed into Mexican territory to protect American oppressors.

8. Permitting United States Ambassador Thompson to enter the business field in Mexico, something that would not have been tolerated in any other country, and granting him personal concessions by means of which he organized the United States Banking Company and the Pan-American Railroad.

9. The arrangement by the noted Cientifico lawyer, Sr. Joaquin Casasus, of the scandalous concessions in the rubber lands in Durango granted to the American multimillionaires John D. Rockefeller and Nelson Aldrich.

10. The verbal arrangement between Senor Limantour, the leader of the Cientificos, and Mallet-Prevost, lawyer of the Tiahualilo Company, of an agreement which ruined the river bank dwellers, both great and small, of the Nazas river, in the cotton region of the "Laguna," who were for the most part Mexicans; and, moreover, the grant of several millions indemnity to the Tiahualilo Company for fake damages.

11. Selling, for a nominal sum, 124,000,000 acres of marvelously fertile lands to 28 favorites, who sold them at very low prices to the foreign companies, mostly Americans, as it was the latter's ambition to

buy up the country by bits, and finally realize the boasted "pacific conquest."

12. Having despoiled the Yaquis, brave and indomitable as the Araucanians, of their magnificent lands, to hand them over to thieving bureaucrats, who wanted them merely to sell to American investors.

13. Despoiling various towns in the state of Mexico of their magnificent wooded hills, in order to favor an American and Senor Jose Sanchez Romos, a Spaniard, proprietors of the paper factories of San Rafael and Anexas.

14. Permitting the banking house of Scherer-Limantour, in combination with American railroad magnates, to buy secretly and at a low figure the stocks of the Mexican Central, the National, the Internation, the Pan-American, and other railroads, to sell them later, at a great advance, to the Mexican government.

15. The complete prostitution of the judicial system, which dictated that in case a foreigner was in litigation with a Mexican the case had to be decided in favor of the foreigner, whether he were right or wrong, without making the Mexican pay the costs; but if the foreigner were an American, his Mexican opponent was obliged to pay the costs of suit.

Is not that an amazing revelation of conditions in Mexico by one in a position to know? And no one has challenged the truth of the statements in this remarkable book. Is there no ground for resentment and anger and indignation against the despoilers of such a splendid country?

The offenses charged against the defendants involve no moral turpitude. Their protests were directed against the tyrants of Mexico.

It is always in order for the people to get rid of tyrants. The greatest men in all ages have justified regicide. John Milton said:

“It is lawful, and has been held so through all ages, for any who have the power, to call to account a tyrant or wicked king, and, after due conviction, to depose and put him to death if the ordinary magistrates have neglected to do it.”

Theodore Roosevelt, in his “Life of Cromwell,” says: “The best men in England approved the execution of the king, not only as a work of necessity, but as right on moral grounds.

“Two weeks after the execution, Milton—perhaps the loftiest soul in the whole Puritan party, full though it was of lofty souls—wrote his pamphlet justifying the right of the nation to depose, or, if need be, execute tyrants and wicked kings. His arguments never have been, and never can be, successfully controverted on grounds of justice and morality.”

Wendell Phillips, in speaking on Nihilism in Russia, said, and it goes freely through the mails:

“One might tremble for the future of the race if such despotism could exist without provoking the bloodiest resistance. Honor Nihilism, since it redeems human nature from the suspicion of being utterly vile, made up only of the heartless oppressors and contented slaves. Every line of our history, every interest of

civilization, bids us rejoice when the tyrant grows pale and the slave rebellious. We cannot but pity the suffering of any human being, however richly deserved, but such pity must not confuse our moral sense. Humanity gains."

Shortly after the world war broke out in Europe, Bernard Shaw, the greatest intellectual force of his time, said, and he spread the saying broadcast through our mails and wherever the English language is spoken: "The way to end this war is for you soldiers to shoot your officers and go home."

Freedom of the Press.

We come lastly to a brief consideration of the question as to whether or not public policy sanctions such a prosecution as this—whether Congress ought, even if it has the power, which we deny, to forbid the use of the mails to propaganda that cannot under the first amendment be otherwise suppressed.

Dr. Benjamin Rush was one of the signers of the Declaration of Independence, and, until his death, treasurer of the United States mint. In 1778 he was a member of the Pennsylvania convention to adopt the federal Constitution, when he said concerning the post-office:

"For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the United States, every state, city, county, village and township in the Union should be tied together by means of the postoffice. This is the true

non-electric wire of government. It is the only means of conveying heat and light to every individual in the federal commonwealth. 'Sweden lost all her liberties,' says the Abbe Raynal, 'because her citizens were so scattered that they had no means of acting in concert with each other.' It should be a constant injunction to the postmasters to convey the newspapers free of all charge for postage. They are not only the vehicle of knowledge and intelligence, but the sentinels of the liberties of our country."

Freedom to advocate revolution is the best way to avoid all unnecessary revolution. In 1774 the Continental Congress, in an address to the inhabitants of Quebec, said:

"The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable or just modes of conducting affairs."

In 1786 Thomas Jefferson drew a legislative resolution to insure religious toleration in Virginia. It reads:

"To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy which at once destroys all liberty, because he, being of course judge of that

tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.

“IT IS TIME ENOUGH FOR THE RIGHTFUL PURPOSE OF CIVIL GOVERNMENT FOR ITS OFFICIALS TO INTERFERE WHEN PRINCIPLES BREAK OUT INTO OVERT ACTS AGAINST PEACE AND GOOD ORDER.”

Reynolds v. U. S., 98 U. S. 163, 25 L. 249.

In 1787, Jefferson, in a letter to James Madison, said:

“I hold that a little rebellion now and then is a good thing, and as necessary in the political world as a storm is in the physical . * * * An observation of this truth should render honest republican governors so mild in their punishment of rebellions as not to discourage them too much. It is a medicine necessary for the sound health of government.”

And in 1792 Jefferson wrote to Stephen Smith:

“Can history produce an instance of rebellion so honorably conducted (referring to Shay’s rebellion)? I say nothing of its motives; they were founded in ignorance, not wickedness. God forbid that we should ever be twenty years without such a rebellion. * * * What country before ever existed a century and a half without a rebellion, and what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts; pardon and pacify them. What signify a few lives lost in a century or two? The tree

of liberty must be refreshed from time to time with the blood of patriots and tyrants.”

Erskine was the greatest lawyer of his time. In the Frost case he said:

“It is easy to distinguish where the public duty calls for the violation of the private one; criminal intention, but not indecent levities, not even grave opinions unconnected with conduct, are to be exposed to the magistrate.

“Constructed by man to regulate human infirmities, and not by God to guard the purity of angels, it (the venerable law of England) leaves to us our thoughts, our opinions and our conversations, and punishes only overt acts, of contempt and disobedience to her authority. Gentlemen, this is not the specious phrase of an advocate for his client, it is not even my exposition of the spirit of our Constitution; but it is the phrase and letter of the law itself.”

And in Parliament he once said:

“When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface;—but pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe.”

The Rev. Robert Hall has a high standing in the literature of free speech. He said:

“The law hath amply provided against overt acts

of sedition and disorder, and to suppress mere opinions by any other method than reasoning and argument is the height of tyranny. Freedom of thought being intimately connected with the happiness and dignity of man in every stage of his being, is of so much more importance than the preservation of any Constitution, that to infringe the former under pretense of supporting the latter, is to sacrifice the means to the end."

Sir Leslie Stephen was one of the greatest men produced by England in the nineteenth century. He said:

"The doctrine of toleration requires a positive as well as a negative statement. It is not only wrong to burn a man on account of his creed, but it is right to encourage the open avowal and defense of every opinion sincerely maintained. Every man who says frankly and fully what he thinks, is so far doing a public service. We should be grateful to him for attacking most unsparingly our most cherished opinions. * * * Toleration, in fact, as I have understood it, is a necessary correlative to a respect for truthfulness. So far as we can lay it down as an absolute principle that every man should be thoroughly trustworthy and therefore truthful, we are bound to respect every manifestation of truthfulness. * * *

"A man must not be punished for openly avowing any principles whatever. * * * Toleration implies that a man is to be allowed to profess and maintain any principles that he pleases; not that he should be allowed in all cases to act upon his principles, especially to act upon them to the injury of others. No

limitation whatever need be put upon this principle in the case supposed. I, for one, am fully prepared to listen to any arguments for the propriety of theft or murder, or if it be possible, of immorality in the abstract. No doctrine, however well established, should be protected from discussion. The reasons have been already assigned. If, as a matter of fact, any appreciable number of persons are so inclined to advocate murder on principle, I should wish them to state their opinions openly and fearlessly, because I should think that the shortest way of exploding the principle and of ascertaining the true causes of such a perversion of moral sentiment. Such a state of things implies the existence of evils which cannot be really cured till their cause is known, and the shortest way to discover the cause is to give a hearing to the alleged reasons."

The fight for free speech is ever on. Congress is wrestling with a gag law now. Senator Borah the other day said:

"Without liberty of speech all the outward forms and structure of free institutions are a sham—a pretense—the sheerest mockery. If speech is not independent and untrammelled; if the mind is shocked or made impotent through fear, it makes no difference under what form of government you live, you are a subject, and not a citizen."

"The words of the Constitution should be given the meaning they were intended to bear when the instrument was framed."

Scott v. Sandford, 19 How. 393, 15 L. 691.

"It is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure equality of right, which is the foundation of free government."

Gulf etc. Ry. Co. v. Ellis, 165 U. S. 160, 41 L. 670.

And for this purpose it is well to remember the utterances for free speech made by the great men of Revolutionary times.

At Boston, in 1773, Dr. Benjamin Church said:

"The constitution of a magistrate does not, therefore, take away that lawful defense against force and injury allowed by the law of nature. * * * As a despotic government is evidently productive of the most shocking calamities, whatever tends to restrain such inordinate power, though in itself a severe evil, is extremely beneficial to society; for where a degrading servitude is the detestable alternative, who can shudder at the reluctant poignard of a Brutus, the crimsoned axe of a Cromwell, or the reeking dagger of a Ravillac."

In 1777 a distinguished lawyer, Benjamin Hitchborn, in a speech at Boston, said:

"I define civil liberty to be, not 'a government by laws,' made agreeable to charters, bills of rights or compacts, but a power existing in the people at large, at any time, for any cause, or for no cause but their own sovereign pleasure, to alter or annihilate both the

mode and essence of any former government, and adopt a new one in its stead.”

Is it not apparent that the defendants in all their written articles brought to the attention of the court in this case were engaged in legitimate efforts, with commendable zeal and with such ability and wisdom as they could command, to bring about a better social condition in the land of their birth?

On the subject of free speech and industrial unrest, the United States Commission on Industrial Relations has this to say at page 150 of the final report:

“One of the greatest sources of social unrest and bitterness has been the attitude of the police toward public speaking. On numerous occasions in every part of the country the police of cities and towns have either arbitrarily, or under the cloak of a traffic ordinance, interfered with or prohibited public speaking, both in the open and in halls, by persons connected with organizations of which the police or those from whom they received their orders did not approve. In many instances such interference has been carried out with a degree of brutality which would be incredible if it were not vouched for by reliable witnesses. Bloody riots frequently have accompanied such interference and large numbers of persons have been arrested for acts of which they were innocent, or which were committed under the extreme provocation of brutal treatment of police or private citizens.

In some cases this suppression of free speech seems to have been the result of sheer brutality and wanton mischief, but in the majority of cases it undoubtedly is

the result of a belief by the police, or their superiors, that they were "supporting and defending the government" by such an invasion of personal rights. There could be no greater error. Such action strikes at the very foundations of government. It is axiomatic that a government which can be maintained only by the suppression of criticism should not be maintained. Furthermore, it is the lesson of history that attempts to suppress ideas results only in their more rapid propagation.

Not only should every barrier to the freedom of speech be removed, as long as it is kept within the bounds of decency and as long as the penalties for libel can be invoked, but every reasonable opportunity should be afforded for the expression of ideas and the public criticism of social institutions. The experience of Police Commissioner Woods of New York city, as contained in his testimony before this commission, is convincing evidence of the good results which follow such a policy. Mr. Woods testified that when he became commissioner of police he found in force a policy of rigid suppression of radical street meetings, with the result that riots were frequent and bitter hatred of the police was widespread. He adopted a policy of not only permitting public meetings at all places where traffic and the public convenience would not be interfered with, but instructing the police to protect speakers from molestation; as a result, the rioting entirely ceased, the street meetings became more orderly and the speakers were more restrained in their utterances."

One of the most powerful pleas ever made for free speech was written by the great constitutional lawyer, John Louis De Lolme, in 1773. He said:

“It is with respect to the right of an ultimate resistance that the advantage of a free press appears in a most conspicuous light. As the most important rights of the people, without the prospect of a resistance which overawes those who should attempt to violate them, are little more than mere shadows, so the right of resisting, itself, is but vain when there are no means of effecting a general union between the different parts of the people. Private individuals, unknown to each other, are forced to bear in silence injuries in which they do not see other people take a concern. Left to their own individual strength they tremble before the formidable and ever ready power of those who govern; and as the latter well know (and are even apt to over-rate) the advantages of their own situation, they think they may venture on anything. But when they see that all their actions are exposed to public view,—that in consequence of the celerity with which all things become communicated, the whole nation forms, as it were, one continued irritable body, no part of which can be touched without exciting an universal tremor,—they become sensible that the cause of each individual is really the cause of all, and that to attack the lowest among the people is to attack the whole people. In short, as the body of the whole people can not act without either subjecting themselves to some power, or effecting a general destruction, the only share they can have in a government, with advantage to themselves,

is not to interfere, but to influence—to be able to act, and not to act. The power of the people is not when they strike, but when they keep in awe; it is when they can overthrow everything, that they never need to move; and Manlius included all in four words, when he said to the people of Rome,—*Ostendite bellum, pacem habebitis.*”

Is it not a laudable purpose to try with pen and voice to ameliorate the social and political ills of distracted Mexico? Can it be said the defendants had any other purpose? Can it be said that their words under such conditions were intended by them to incite murder and assassination? Can it be said they must have known that their words would tend to incite murder and assassination? Did they not have before them on many a page of human history the example of thousands of patriots and lovers of liberty in every land to lead them to believe they were justified in using strong language in their endeavors to point out the way of escape from an intolerable tyranny in our sister republic? Shall they not be judged by their motives and by the humane and lofty spirit apparent in every line? When so judged we are impelled to the conclusion that they have written their names imperishably on the scroll of history as among those who loved their fellow-men and among those who have suffered and died that freedom should not perish from the earth.

In closing we cannot do better than to quote the powerful argument of the illustrious James Mill, the father of his even more illustrious son, John Stuart

Mill, written in 1821, on the liberty of the press. He said:

“Exhortations to resist all powers of government at once should not be considered offenses. Unless a door is left open to resistance of government, in the largest sense of the word, the doctrine of passive obedience is adopted; and the consequence is, the universal prevalence of misgovernment ensnaring the misery and degradation of the people. On the other hand, unless the operations of government, instituted for the protection of rights, are secured from obstruction, the security of rights, and all the advantages dependent upon the existence of government, are at an end. Between these two securities, both necessary to obtain the benefits of good government, there appears to be such a contrariety that the one can only be obtained by the sacrifice of the other. * * *

“The application of physical force which is treated as an evil is clearly distinguishable from that resistance of government which is the last security of the many against the misconduct of the few. * * *

“It is resistance to all the powers of government at once, either to withdraw them from the hands in which they have hitherto been deposited, or greatly to modify the terms upon which they are held. * * *

“We think it may be satisfactorily shown that no operation of the press, however directly exhorting to this species of resistance, ought to be treated as an offense.

“The reason is, that no such exhortation can have any immediate or formidable effect; can, indeed, have

any effect at all, except through such a medium as ought to be, at all times perfectly free. Suppose that a work is published, exhorting the people in general to take arms against the government, for the purpose of altering it against the consent of its rulers. The people cannot take arms against the government without the certainty of being immediately crushed, unless there has been already created a general consent. If this consent exists in such perfection as to want nothing to begin action but an exhortation, nothing can prevent the exhortation, and forbidding it is useless. If the consent does not exist in nearly the last degree of perfection, a mere exhortation, read in print, can have no effect which is worth regarding. In all circumstances, therefore, it is useless, and consequently absurd, to treat this species of exhortation as an offense. If, on the other hand, it were clearly recognized that every man had a license to exhort the people to a general resistance of government, all such exhortations would become ridiculous, unless on those rare and extreme occasions on which no prohibitions and no penalties can or ought to prevent them. * * *

“We think it will appear, with sufficient evidence, that in the way of indirect exhortations to resistance, that is, in laying the grounds of dissatisfaction with the government, there is no medium between allowing everything and allowing nothing; that the end, in short, which is sought to be gained by allowing anything to be published in censure of the government, cannot be obtained without leaving it perfectly free to publish everything.

“The end which is sought to be obtained, by allowing anything to be said in censure of the government, is, to ensure the goodness of the government; the most important of all the objects, to the attainment of which, the wisdom of man can be applied. If the goodness of government could be ensured by any preferable means, it is evident that all censure of the government ought to be prohibited. All discontent with the government is only good in so far as it is a means of removing real cause of discontent. If there is no cause, or if there is better means of removing the cause, the discontent is, of course, an evil and that which produces it an evil.

“So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.

“For what is meant by a vicious government? or wherein do the defects of government consist? Most assuredly they all consist in sacrificing the interests of the many to the interests of the few. The small number in whose hands the powers of government are, in part directly, in part indirectly, placed, cannot fail, like other men, to have a greater regard for what is advantageous to themselves, than what is advantageous to other men. They pursue, therefore, their own advantage, in preference to that of the rest of the community. That is enough. Where there is nothing to

check that propensity, all the evils of misgovernment, that is, in one word, the worst evils by which human nature is afflicted, are the inevitable consequence.

“There can be no adequate check without the freedom of the press. The evidence of this is irresistible. In all countries the people either have a power legally and peaceably of removing their governors, or they have not that power. If they have not that power, they can only obtain very considerable ameliorations of their governments by resistance, by applying physical force to their rulers, or, at least, by threats so likely to be followed by performance, as may frighten their rulers into compliance. But resistance, to have this effect, must be general. To be general, it must spring from a general conformity of opinion, and a general knowledge of that conformity. How is this effect to be produced, but by some means, fully enjoyed by the people, of communicating their sentiments to one another? Unless where the people can all meet in general assembly, there is no other means, known to the world, of attaining this object, to be compared with the freedom of the press.

“This requires the use of the cheapest means of communication, and, we add, the free use of those means.

“To impose any restraint upon the liberty of the press is undoubtedly to make a choice. If the restraint is imposed by the government, it is the government that chooses the directors of the public mind. If any government chooses the directors of the public mind, that government is despotic.

“If you say that no man is to pass an unjust censure upon the government, who is to judge? It is surely unnecessary to repeat the proof of the proposition that there is nobody who can safely be permitted to judge. The path of practical wisdom is as clear as day: All censures must be permitted equally; just and unjust.

“We have then arrived at the following important conclusions,—that there is no safety to the people in allowing anybody to choose opinions for them; that there are no marks by which it can be decided beforehand what opinions are true and what are false; that there must, therefore, be equal freedom of declaring all opinions, both true and false; and that, when all opinions, true and false, are equally declared, the assent of the greater number, when their interests are not opposed to them, may always be expected to be given to the true. These principles, the foundation of which appears to be impregnable, suffice for the speedy determination of every practical question.

“That the people ought, therefore, to know the conduct of their judges, and when we say judges we mean every other functionary, and the more perfectly the better, may be laid down as indubitable. They are deprived of all trustworthy means of knowing, if any limit whatsoever is placed to the power of censure.

“Freedom of discussion means the power of presenting all opinions equally, relative to the subject of discussion; and of recommending them by any medium of persuasion which the author may think proper to employ. If any obstruction is given to the delivering

of one sort of opinions, not given to the delivering of another; if any advantage is attached to the delivering of one sort of opinions, not attached to the delivery of another; so far equality of treatment is destroyed, and so far the freedom of discussion is infringed; so far truth is not left to the support of her own evidence; and so far, if the advantages are attached to the side of error, truth is deprived of her chance of prevailing.

“The question is, whether indecent discussion should be prohibited? To answer this question we must, of course, inquire what is meant by indecent.

“In English libel law, where this term holds so distinguished a place, is it not defined?

“English legislators have not hitherto been good at defining; and English lawyers have always vehemently condemned and grossly abused it. The word ‘indecent,’ therefore, has always been a term under which it was not difficult, on each occasion, for the judge to include whatever he did not like. ‘DECENT’ AND ‘WHAT THE JUDGE LIKES’ HAVE BEEN PRETTY NEARLY SYNONYMOUS.

“If I say that such a judge, on such an occasion, took a bribe and pronounced an unjust decision which ruined a meritorious man and his family, this is a simple declaration of opinion, and ought not, according to the doctrine already established, to meet with the smallest obstruction. If I also state the matter of fact with regard to myself, that this action has excited in me great compassion for the injured family, and great anger and hatred against the author of

their wrongs, this must be fully allowed. I must further be allowed to express freely my opinion, that this action ought to excite similar sentiments in other members of the community, and that the judge ought to receive an appropriate punishment. Much of all this, however, I may say in another manner. I may say it much more shortly by implication. Here, I may cry, is an act for the indignation of mankind! Here is a villain who, invested with the most sacred of trusts, has prostituted it to the vilest of purposes! Why is he not an object of public execration? Why are not the vials of wrath already poured forth upon his odious head? All this means nothing but that he has committed the act; that I hate him for it, and commiserate the sufferers; that I think he ought to feel as I do. It cannot be pretended that between these two modes of expression the difference, in point of real and ultimate effect, can be considerable. For a momentary warmth the passionate language may have considerable power. The permanent opinion formed of the character of the man, as well as the punishment which, under a tolerable administration of law, he can sustain, must depend wholly upon the real state of the facts; any peculiarity in the language in which the facts may have been originally announced soon loses its effect.

“You cannot forbid the use of passionate language without giving a power of obstructing the use of censorial language altogether. The reason exists in the very nature of language. You cannot speak of moral acts in language which does not imply approbation and

disapprobation. All such language may be termed passionate language. How can you point out a line where passionate language begins, dispassionate ends? The effect of words upon the mind depends upon the associations which we have with them. But no two men have the same associations with the same words. A word which may excite strains of emotion in one breast will excite none in another. A word may appear to one man a passionate word which does not appear so to another. Suppose the legislature were to say that all censure conveyed in passionate language shall be punished, hardly could the vices of either the functionaries or the institutions of government be spoken of in any language which the judges might not condemn as passionate language, and which they would not have an interest, in league with other functionaries, to prohibit by their condemnation. The evil, therefore, which must of necessity be incurred by a power to punish language to which the name of passionate could be applied, would be immense. The evil which is incurred by leaving it exempt from punishment is too insignificant to allow that almost anything should be risked for preventing it."

May it not be that the defendants, in what they wrote and for which they have suffered many months in jail awaiting trial, had no thought of aught except to help their brothers in Mexico gain something more of freedom and something more for themselves of the good things that country so bounteously produces?

May it not be that they saw the goal but did not know the road? May it not be that their love was

greater than their discretion? May it not be that they had no strength to wait for Mexico's redemption, but only strength to make such protest as they could with the only weapons they had—the pen and the printing press? They have been in prison before for the cause of Mexico, and they are not afraid to go to prison again for the cause of land and liberty to which they have dedicated their lives, but we beg of this Honorable Court to consider well their case, and to consider well whether the cause of justice will not best be served by reversing the judgment herein and discharging the accused.

We close with the following lines written by a lover of Irish freedom shortly after the execution of those devoted sons of Ireland who participated in the Dublin revolt. These powerful lines by an unknown poet are not inapropos to the case of the defendants:

Pray every man in his abode
And let the church bells toll,
For those who did not know the road,
But only saw the goal.

Let there be weeping in the land,
And charity of mind
For those who did not understand,
Because their love was blind.

Their errant scheme that we condemn,
All perished at a touch;
But much should be forgiven them
Because they loved much.

Let no harsh tongue applaud their fate,
Or their clean names decry;
The men who had no strength to wait,
But only strength to die.

Come all ye to their requiem,
Who gave all men can give,
And be ye slow to follow them,
And hasty to forgive.

And let each man in his abode,
Pray for each dead man's soul,
Of those who did not know the road,
But only saw the goal.

It is respectfully submitted that the verdict and judgment should be set aside and the defendants discharged.

J. H. RYCKMAN,
Attorney for the Plaintiffs in Error.

No. 2901.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT. 8

Enrique Flores Magon and
Ricardo Flores Magon,

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Filed

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BRIEF OF DEFENDANT IN ERROR.

Plaintiffs in error in this case (hereinafter called the defendants) were convicted under section 211 of the Federal Penal Code, as amended by the Act of March 4, 1911; the amendment reading:

“And the term ‘indecent’ within the intendment of this section shall include matter of a character tending to incite arson, murder or assassination.”

The indictment under which these defendants were convicted contained three counts. They were convicted upon the second and third counts and acquitted on

the first count. The particular matter complained of as “indecent” within the intendment of the statute, is as follows:

Second Count.

“Justice, and not bullets is what ought to be given to the revolutionists of Texas, and from now on we should demand that those persecutions to innocent Mexicans should cease, and as to the revolutionists, we should also demand that they be not executed (shot).

“The ones who should be shot are the ‘rangers’ and the band of bandits who accompany them in their depredations.”

* * * * *

“Enough of reforms! What we hungry people need is entire liberty based on economic independence. Down with the so-called rights of private property, and as long as this evil right continues to exist we shall continue under arms. Enough with mockery! Poor people, whoever speaks to you about Carranzismo, spit in their face and break their jaws.

“Long live land and Liberty!”

Third Count.

“So you see, brother Carrancistas, the problem which is going to be solved by the rebels who retain their arms, when Carranza becomes president, is the same problem that you will have to decide, because it affects you in the same manner. Your duty is to help and for this purpose do not surrender your arms when the troops are ordered disbanded. What you should do at such a time, or before, if possible, is to rebel, turn your arms against your chiefs and officers and without

trembling pulse open fire with your rifles, because they are your enemies, and are concerned in having these conditions last forever, so they can have a life of privilege.

“A strong heart, a firm pulse and steady aim is all you need to exterminate your immediate oppressors.

“If you surrender your arms you will return to your home in poverty, ready to sell your blood and strength to the rich at their own price.

“You will have accomplished nothing, but in the meantime your chiefs and officers will enjoy, in the city, all kinds of pleasures and honors and display on their breasts crosses and medals. If you remain in the Carranza army as a permanent soldier you will be a bad man, an executioner of you brothers of your class because you will help to serve the rich.

“Honor points to the road you should take; rebel against all governments until you attain the triumph of the principles comprised in the declaration of the 23 of September, 1911, expedited by the ‘Mexican Liberal Party,’ principles that advocate the death of Capital, or Authority and the clergy of all religions.

“Decide to follow this road. Don’t be deceived by the specious arguments of alleged wise politicians, these same arguments were used by the enemies of the great French revolution to prevent people from obtaining their political liberty. It was the argument of Porfirio Diaz to prevent you from obtaining your liberties; it is also the argument of the Carranza party used to prevent you from obtaining your economic liberty, which is the foundation of all liberties. This means the privilege of earning your living by working for yourself and being independent, and this can only be ob-

tained, understand, by expropriation of land, houses, machinery, means of transportation and merchandise, becoming common property without the distinction of men or women, race or color. He who tells you the contrary, spit in his face, and even kill him, because it is necessary, it is absolutely necessary to initiate a revolutionary campaign of house-cleaning.

“We, the disinherited, must rid ourselves of those who are in our way, if we can, by hook or crook, the same as we get rid of the tiger, as we annihilate the rattlesnake, as we *scruch* the tarantula. Those who tell you that they are not prepared for this or other conquests which benefit you are the ones who have interest in delaying your emancipation so that in the meantime they can live at your expense.”

The transcript of record does not purport to set out any testimony introduced on behalf of the Government to establish the guilt of the defendants and it only sets out the testimony of the two defendants themselves. We must, therefore, conclude that the Government proved every element of the crime necessary for the conviction of these defendants. Further, the defendant Enrique Flores Magon admitted that he owned the paper “Regeneracion,” and printed and published the same at Los Angeles, and that this paper contained the articles objected to, as set out in the indictment; and Ricardo Flores Magon admitted that he was the writer of the objectionable articles.

ARGUMENT.

We will take up the points argued by counsel for plaintiffs in error, in the order in which he has argued them in his brief. On page 12 *et seq.* of his brief, he argues at great length that the indictment is bad for uncertainty, for the reason that it cannot be definitely ascertained what the clause "matter of a character tending to incite arson, murder or assassination" means, and that the same is so vague and indefinite that the statute is absolutely void, in accordance with the maxim "*Ubi jus incertum, ibi jus nullum.*" He argues that what one jury might find would incite a man to arson, murder or assassination, another jury would find to be "a perfectly legitimate expression of righteous indignation, or a mere ardor of sentiment, or at most, a verbal indiscretion, or only a piece of rant or harmless levity or innocuous braggadocio."

Counsel states that this is probably the first prosecution under this amendment to section 211. We also have searched the books for a reported case brought under this amendment, but have failed to find any, so, in order to establish the validity of this amendment, we must look to the reported decisions under the statutes of the United States similar to this one. Before this amendment the statute read:

"Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or

described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier."

Now, the argument of counsel would be as applicable to the section before amendment, as it would be to the amendment, for obviously what to a moral man would be obscene, lewd, lascivious and filthy, on an immoral man or an unmoral man would have no effect whatever. Likewise, a jury in one community might find that a

writing was obscene, lewd and lascivious, and a jury in another district might find that the same writing was harmless. In this connection the court in the case of *Croomer v. United States*, 213 Fed. 1, states:

“It is also said that because of the uncertainty in the test of obscenity there is a total absence of criteria of guilt, and therefore that the statute cannot constitute due process of law; that the equality required thereby is violated; that the law is violative of the constitutional guaranty against *ex post facto* laws; and that the defendant is not informed of the nature of the accusation against him. Section 211 of the Criminal Code is, with a few slight changes, a re-enactment of section 3893 of the Compiled Statutes. The only change that could affect the construction heretofore placed upon section 3893 by the courts is the addition of the words “and every filthy book, pamphlet,” etc. These words certainly do not tend to narrow the scope of the statute. Without discussing them separately, it is sufficient to say that all of the questions suggested by counsel affecting the constitutionality of this section of the Code have been before the courts in construing section 3893, and by an almost unbroken line of authority have been held to be without merit.”

In construing this statute, it has always been held that if the particular matter complained of were of such a nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try one charged with violating this section, tend to deprave or corrupt the morals of reasonable persons, and would suggest to the minds of either sex thoughts of an im-

pure or libidinous character, it is within the prohibition of the statute.

U. S. v. Musgrave, 160 Fed. 700;

Macfadden v. U. S., 165 Fed. 51;

Knowles v. U. S., 170 Fed. 409;

Demolli v. U. S., 144 Fed. 363;

Rosen v. U. S., 161 U. S. 29.

It will thus be seen in all these authorities the test of the obscenity of the objectionable matter, is the tendency to deprave and corrupt the minds of those who are open to such influence into whose hands the publication may come.

Now, in the case at bar, the test is the tendency to incite in the minds of those into whose hands the publication might fall, arson, murder or assassination, and in each instance it must be for the jury to determine whether or not the writing complained of is of the prohibited character.

Likewise a portion of section 211 reads:

“And every article, instrument, substance, drug, medicine or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose.”

Here again we have practically the same situation as that arising in the amendment. What one jury might find was advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, another jury might find was absolutely incapable of such a construction, and,

in our view, the amendment under which this indictment was brought is as definite and certain as those portions of the statute which have heretofore been uniformly held to be good by all the courts of the United States.

Section 212 of the Federal Penal Code reads as follows:

“All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the postmaster-general shall prescribe.”

Here also it is left to the jury to determine whether or not the delineations, epithets, terms or language, etc., are “calculated by the terms or manner or style of display, and obviously intended to reflect injuriously upon the character or conduct of another,” and this statute has likewise uniformly been held to be good.

Again, the famous fraud section of the Federal Penal Code, section 215, is of the same character, in that a jury must determine (1) that there was a scheme or artifice to defraud devised by the defendant, (2) that the scheme or artifice to defraud was to be

effected by correspondence through the postoffice establishment of the United States, and (3) that a letter or package was actually placed in the postoffice or received from the postoffice of the United States, which package or letter was in furtherance of such scheme or artifice to defraud. Here also the duty rests on the jury to decide questions of equal uncertainty as those they were called upon to decide in the case at bar. This statute has likewise been uniformly held to be good.

Let us look at it from another angle. Under the common law there was such a thing as an accessory before the fact, and while accessories before the fact have now been made principals in federal cases, by statute, yet the analogy between an accessory before the fact and a person violating this amendment to 211, is very close. An accessory before the fact might become guilty by his words of counsel or advice to another to commit a crime, provided the crime were committed. It then devolved upon the jury to pass upon whether or not the counsel which the accessory gave the principal was such as would tend to incite him to the commission of the crime. This is essentially the case at bar, for it is for the jury to say whether the words or council in the objectionable articles would incite another to commit arson, murder, or assassination.

We are unable to distinguish between the duty devolving upon a jury trying a case under any of these statutes above cited, and that devolving upon a jury trying a case under the amendment to section 211. We have no fault to find with the principles of law laid

down in the argument of counsel for defendants for the determination of the validity of a statute, but we are frank to say that we do not see how they are applicable in any manner to the statute under which this prosecution is brought.

Specification of Error No. 7.

This specification of error has to do with the alleged invalidity of the indictment, for the reason that the newspapers placed in the postoffice were not described as being addressed to any parties whomsoever. In this connection the indictment states "that Enrique Flores Magon, Ricardo Flores Magon and Wm. C. Owen * * * did, knowingly, willfully, unlawfully and feloniously deposit and cause to be deposited in the postoffice and the stations thereof * * * a newspaper published and printed in the said city of Los Angeles and named and called "Regeneracion," which said newspaper did then and there contain certain indecent, vile and filthy substance and language, and which said newspaper was a publication of an indecent character, and which said indecent, vile and filthy substance and language was of a character tending to incite in the minds of persons reading the same, murder and assassination * * * And said newspaper of said indecent character was so deposited and caused to be deposited in said United States postoffice at said city of Los Angeles to be transmitted by the postoffice establishment to many and divers persons within the United States of America and within the Republic of Mexico; the names of which divers persons are unknown to the grand jurors."

Counsel relies upon the case of the United States v. Brazeau, 78 Fed. 464, in his argument on this point; and while this case has been cited with approval in other later cases where the validity of an indictment was in question, so far as we have been able to ascertain, it has never been cited with approval upon the point that an allegation that the letters or newspapers mailed were addressed is a necessary allegation in an indictment under section 211.

In the case of Durland v. United States, 161 U. S. 306, the court states:

“The second (assignment of error), which applies more fully to the first than the second case, is that the indictment is defective in that it avers that in pursuance of this fraudulent scheme twenty letters and circulars were deposited in the post-office, without in any way specifying the character of those letters or circulars. It is contended that the indictment should either recite the letters, or at least, by direct statements, show their purpose and character, and that the names and addresses of the parties to whom the letters were sent should also be stated, so as to inform the defendant as to what parts of his correspondence the charge of crime is made, and also to enable him to defend himself against a subsequent indictment for the same transaction. These objections were raised by a motion to quash the indictment, but such a motion is ordinarily addressed to the discretion of the court, and a refusal to quash is not, generally, assignable for error. *Logan v. United States*, 144 U. S. 263, 282.

“Further, the omission to state the names of the parties intended to be defrauded and the names and addresses on the letters is satisfied by the

allegation, if true, that such names and addresses are to the grand jury unknown. And parol evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal. *Dunbar v. United States*, 156 U. S. 185, 191.

“It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters, so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud. But still we think that as it stands it must be held to be sufficient. There was a partial identification of the letters by the time and place of mailing, and the charge was that defendant ‘intending in and for executing such scheme and artifice to defraud and attempting so to do, placed and caused to be placed in the postoffice,’ etc. *This, it will be noticed, is substantially the language of the statute. If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars.* *Rosen v. United States*, 161 U. S. 29.” (Italics ours.)

In the indictment under which this prosecution is brought we have every element specified as necessary in the *Durland* case. The pleader has stated that the names of the people to whom these papers were to be sent are unknown to the grand jurors, but that they were deposited for mailing and delivery to such persons in the United States and Mexico. Obviously, the name is a material part of the address, and it being alleged that the names are unknown to the grand jurors, the requirements as set out in the *Durland* case are fully and completely met.

Counsel also cites the case of the United States v. Harris, 122 Fed. 551, in support of his contention in that case, but Judge Hawley distinctly says:

“Counsel for defendant has, in support of his motion, called my attention to several authorities—among others, United States v. Brazeau (C. C.), 78 Fed. 464—where it was held that, in an indictment for depositing in the mails newspapers containing obscene matter, it was essential that the indictment should aver that the newspapers were addressed. The correctness of that opinion, as applied to the facts of that particular case, will not be questioned; but I am unable to agree with the statement therein made that ‘the statute does not make criminal the mere depositing in the postoffice of obscene matter,’ or that the intent of the defendant in depositing a letter or paper to employ the mails for the transmission of obscene matter must be averred. I am of the opinion, after a careful reading of the language of the statute, that the gist of the offense consists in the depositing, or causing to be deposited, to be conveyed or delivered by the mail, any letter containing or relating to the prohibited matter, and that the address goes only to the point of the identification of the letter alleged to have been deposited, or caused to be deposited, and indicating to whom or where it is to be conveyed. United States v. Lynch (D. C.), 49 Fed. 851; United States v. Janes (D. C.), 74 Fed. 545; United States v. Fulkerson (D. C.), 74 Fed. 631, 633. The statute does not, in terms, declare that the letter should be enclosed in an envelope or wrapper containing the address of the person to whom it was to be sent, or that the postage thereon should be paid.”

Here we have the precise position taken by the Government in this case, namely: that the address is merely a matter of description and not a necessary allegation in the indictment.

In the case of the United States v. Lynch *et al.*, 49 Fed. 851, Judge Ross, sitting as a district judge, in passing upon a demurrer to the section of the revised statutes now included in section 213 of the Federal Penal Code, said in part:

“The address goes only to the point of the identification of the paper alleged to have been deposited and caused to be deposited and to indicate to whom or where it is to be conveyed and delivered. The gist of the offense consists in the depositing or causing to be deposited, to be conveyed or delivered by mail, any newspaper containing or relating to the prohibited matter.”

Specification of Error No. 8.

Counsel contends that the indictment is further defective, in that it contains no averment that the newspapers were non-mailable. We are unable to see any force whatever in the argument on this point. The indictment follows the language of the statute in describing the objectional articles contained in the newspapers, and while it is not alleged that the newspapers were non-mailable, it is alleged that they contained everything necessary to bring them within the non-mailable class, and we fail to see how the use of the word “non-mailable” would add anything to the force of the language used in the indictment.

Counsel relies upon the case of the United States v. Clifford, 104 Fed. 296, in support of his position on this point, but the most casual reading of the Clifford case will show that the district judge was absolutely correct in his decision in that case on the sufficiency of the indictment in its charging part. The indictment in that case merely charged:

“Unlawfully, did knowingly deposit, and cause to be deposited, at the city of Martinsburg, in said district, in the postoffice of the said United States there, for mailing and delivery, certain printed newspapers, to-wit, fifty printed newspapers, then and there addressed to divers persons, respectively, which said persons are to the grand jurors afore-said unknown, and each then and there containing, amongst other things, the following matters in point; that is to say”

Thereupon the pleader sets out in full the articles said to have been mailed by the defendant; but in no place in that indictment was it alleged that the matter complained of was of the character prohibited by section 211, to-wit, obscene, lewd, lascivious, filthy or indecent. The case is essentially different from the case at bar and has no bearing upon this point.

Specification of Error No. 9.

Counsel in this specification of error alleges that the indictment is insufficient because it does not appear therefrom that the defendants, or either of them, knew that the papers alleged to have been deposited by them in the postoffice contained indecent matter or knew its import, or that it was of a character tending to incite

murder or assassination. In support of his decision he cites several cases which are more or less old.

The indictment in its charging parts states that the defendants “did *knowingly*, willfully, unlawfully and feloniously,” etc. We believe that the word “*knowingly*,” as thus used, applies to every part of the offense as described thereafter.

The Circuit Court of Appeals, Fifth Circuit, in the case of *Stayton v. United States*, 213 Fed. 224, said:

“The plaintiff in error was convicted under article 211 of the Penal Code (Act of March 4, 1909, C. 321, 35 Stat. 1129 (U. S. Compt. St. Supp. 1911, p. 1651) under an indictment charging that she did

“‘Unlawfully, feloniously, and knowingly deposit and cause to be deposited in the United States postoffice at Ft. Worth, Texas, for mailing and delivery, a certain letter giving information as to where an act producing abortion could be had, done, and performed.’

“The only error assigned in this court is that the court overruled the preliminary motion to quash the indictment:

“‘Because the said indictment nowhere directly or indirectly charges that this defendant had any knowledge of the contents of the letter complained of at the time she is alleged to have deposited the said letter in the postoffice at Ft. Worth, Tex., for the purpose of mailing. A knowledge of the contents of the letter at the time of the mailing is a necessary ingredient of the offense, and must be alleged and proven by the Government before a conviction can be had under article 211 of the Penal Code of the United States.’

“Our examination shows no error in the ruling. United States v. Purvis (D. C.), 195 Fed. 618, and authorities there cited; Price v. United States, 165 U. S. 311, 312, 17 Sup. Ct. 366, 41 L. Ed. 727.”

The Supreme Court in the case of Price v. United States, cited in the foregoing opinion, held an indictment in almost identically the same words in the charging part as this indictment, to be good, and that the word “knowingly” applied to every element of the offense as described.

In the case of Rosen v. United States 161 U. S. 29, cited by counsel for defendants, the Supreme Court held an indictment in this language to be good.

The Clifford case, relied upon by counsel for defendants, would thus seem to be directly in conflict with these cases which are ruling and controlling, and, therefore, it cannot be followed.

We come now to the discussion of counsel for the plaintiffs in error of specifications of error numbers 11, 12, 5 and 10, on page 39 *et seq* of his brief. Numbers 11 and 12 have to do with the district court sustaining an objection propounded to the defendants on direct examination, which question was as follows: “At the time you deposited or caused to be deposited in the mail the alleged non-mailable matter set out in the second and third counts of the indictment, did you know such matter to be of a character tending to incite murder or assassination?”

Counsel argues that inasmuch as the offense was charged to be knowingly and willfully done, intent was

an element of the offense, and cites authorities to the effect that when intent is an element of the offense, it is error for the district court to refuse to allow the defendant to testify as to his intent. But counsel is mistaken in his application of those principles to this case. The words "knowingly" and "willfully" go no further than to the effect that the defendants knowingly and willfully caused the newspapers containing the objectionable articles to be introduced into the United States mails; and, whether or not they considered these articles to be of a character which would incite murder or assassination is of no weight whatever in determining their guilt.

In a prosecution under this section, before it was amended, the Supreme Court said, in *Rosen v. United States*, 161 U. S. 41:

"At the trial below the defendant, by his counsel, asked the court to instruct the jury that he should be acquitted if they entertained a reasonable doubt whether he knew that the paper or publication, referred to in the indictment, was obscene. This request was refused, and an exception was taken to the ruling of the court.

"This request for instructions was intended to announce the proposition that no one could be convicted of the offense of having unlawfully, wilfully, and knowingly used the mails for the transmission and delivery of an obscene, lewd, and lascivious publication—although he may have had at the time actual knowledge or notice of its contents—unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious. The statute is not to be so interpreted. The inquiry under the statute is whether

the paper charged to have been obscene, lewd, and lascivious, was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd and lascivious."

Applying this principle to the case at bar, it was not for the defendants to say whether or not the matter was of the character alleged, but for the jury, and the fact that they did or did not know that such matter would incite others to murder or assassination could in no wise be a defense to the action; therefore, if it would avail them nothing, the question was immaterial, irrelevant and incompetent, and the trial court was right in refusing to allow the defendants to express their opinion as to the objectionable character of the matter complained of.

Counsel then proceeds to argue that Congress overstepped its rights, when it enlarged the meaning of the word “indecent” to include matter of a character tending to incite murder, arson or assassination. Philologically speaking, this word may not have the meaning attributed to it in this statute, but undoubtedly Congress has a right to prohibit matter of a character tending to incite arson, murder or assassination from the mails, and if it has that right, it must have the further right to determine under which section of its laws such a prohibitive measure should be included; and in this case it has determined that the prohibited matter should be included under section 211, by enlarging the meaning of the word “indecent” to cover matter of a character tending to incite murder, arson or assassination. This contradicts no legal rule, so far as we have been able to ascertain, nor does it savor of undue process, or is it in the nature of an *ex post facto* law, and we are unable to perceive why Congress was not acting well within its rights when it passed this amendment. The word “decent” comes from the Latin root “decens,” which means “to be fitting or becoming, akin to glory, honor, ornament, to seem good, to seem, think, to be gracious.” The addition of the prefix “in” to this root gives us the word “indecent,” and “in” in this sense would mean contrary to those things above stated. So, it is not such a far-fetched interpretation which Congress has given to this word as counsel would lead us to believe.

The case of *Rosen v. United States*, 161 U. S. 41 above, set out in the argument on specifications of error

numbers 11 and 12, is sufficient answer to the contention of counsel for defendants, on page 41, and designated by the Roman numeral III, wherein he asks the question:

“Did the defendants know, or could they have known that the printed matter claimed in the indictment to be non-mailable was ‘indecent’ or that it was ‘of a character tending to incite, in the minds of persons reading the same, murder and assassination’ in the language of the indictment, or of a character tending to incite murder or assassination in the language of the statute?”

Counsel then proceeds to give us a history of Mexico, and the reasons why the defendants wrote and circulated the matter complained of. We are not interested in the history of Mexico, or what actuated these defendants to write and publish these articles and deposit them in the mail. The only thing that interests us is whether or not the articles are of the prohibited character mentioned in the statute, and the jury found that this was the case.

We come last to the point argued on page 52 *et seq* of the brief of counsel for defendants, under the title “Freedom of the Press.” This is the final argument of most people, and, particularly the peculiar party with which these defendants are affiliated, viz.: anarchists, who find themselves in the toils of the law for publishing and circulating literature of a forbidden kind. Their one and great cry is that they are protected by the constitution of the United States in saying what they please and in publishing what they

please, if they are sincere and believe that good will be accomplished thereby.

In the case of *Coomer v. United States*, 213 Fed. 1, the court said that this statute, before the 1911 amendment by an almost unbroken line of authority, had been found to be constitutional.

In the case of the *United States v. Journal Co.*, 197 Fed. 415, reading from page 418, the court said:

“The defendant insists that the indictment in this case should not be sustained because the same is in derogation of its constitutional rights and privileges as the publisher of a daily newspaper. Amend. I, Const. U. S. This position cannot be successfully maintained as the constitutional guaranty of a free press cannot be made a shield from violation of criminal laws, which are not designed to restrict the freedom of the press, but to protect society from acts clearly immoral or otherwise injurious to the people. The postal service is one of the agencies of the Federal Government that it has the right under the constitution to maintain, and under it, and the laws passed in pursuance thereof, as well as what may be termed its police authority respecting the subject, it has the right to determine the manner and method of conducting the same, and to exclude therefrom what may be considered injurious to public morals, and in so doing it neither restricts nor deprives the press of any constitutional privilege or right. It simply declines to become an agency for the distribution and circulation of printed and other matter which it considers of an objectionable character; and it doubtless is within the power of the Government to withdraw or discontinue its postal system en-

tirely. *Ex parte* Jackson, 96 U. S. 727, 736, 24 L. Ed. 877; *In re* Rapier, 143 U. S. 110, 133, 134, 12 Sup. Ct. 374, 36 L. Ed. 93; *Public Clearing House v. Coyne*, 194 U. S., 497, 506, 24 Sup. Ct. 789, 48 L. Ed. 1092; *Knowles v. United States*, 170 Fed. 409, 411, 95 C. C. A. 579, *supra*, and cases cited; *Watson on the Constitution*, 6441, 648, 649, 650.

“In *ex parte* Jackson, 96 U. S. 732, 24 L. Ed. 877, *supra*, Mr. Justice Field aptly remarked the difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.”

It will thus be seen that this statute has been held to be constitutional and not to abridge any constitutional rights prior to the amendment of 1911. The amendment does not change the character of the statute, but simply enlarges it, and we see no reason why these authorities above cited should not apply equally to the amendment as they did to the statute before it was amended.

Counsel concludes his brief with a dramatic appeal that these defendants should not be prosecuted for their error of vision, for, he argues, “they did not know the road, but only saw the goal.” It is no fault of the Government officers that these men “did not know the road” and that they find themselves in the position they are now in. They admit that they have been in trouble with the authorities ever since they have been in the United States and that they have served repeatedly

in jails and in penitentiaries for their crimes. They are not entitled to any sympathy and have only themselves to blame. They admit that they are anarchists, and are opposed to all law and government, ^A ~~and as~~ ^{they} ~~are~~ a menace to the community at large, and are safer incarcerated.

For the foregoing reasons, we respectfully submit that the verdict and judgment of the lower court should be affirmed.

ALBERT SCHOONOVER,

United States Attorney;

CLYDE R. MOODY,

Assistant U. S. Attorney;

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

9

AMERICAN WATER WORKS AND ELECTRIC
COMPANY, a corporation, and WILLIAM T.
WALLACE, Receiver of Great Shoshone & Twin
Falls Water Power Company, a corporation,
Appellants,

VS.

GUY I. TOWLE, plaintiff, GREAT SHOSHONE &
TWIN FALLS WATER POWER COMPANY, a
corporation, defendant, and BOISE TITLE AND
TRUST COMPANY, a corporation, LYNCH-
CANNON ENGINEERING COMPANY; a cor-
poration, EQUITABLE TRUST COMPANY OF
NEW YORK, a corporation, INTER-MOUN-
TAIN ELECTRIC COMPANY, a corporation,
THE THOUSAND SPRINGS POWER COM-
PANY, a corporation, ELECTRIC INVEST-
MENT COMPANY, a corporation, L. M. PLUM-
MER and E. B. SCULL, Executors of the Estate
of L. L. McClelland, deceased, intervenors and
petitioners,
Appellees.

Filed

Transcript of the Record

DEC 26 1916

F. D. Monckton,
Clerk.

Upon Appeal from the United States District Court
for the District of Idaho, Southern Division

No.....

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN WATER WORKS AND ELECTRIC
COMPANY, a corporation, and WILLIAM T.
WALLACE, Receiver of Great Shoshone & Twin
Falls Water Power Company, a corporation,
Appellants,

vs.

GUY I. TOWLE, plaintiff, GREAT SHOSHONE &
TWIN FALLS WATER POWER COMPANY, a
corporation, defendant, and BOISE TITLE AND
TRUST COMPANY, a corporation, LYNCH-
CANNON ENGINEERING COMPANY, a cor-
poration, EQUITABLE TRUST COMPANY OF
NEW YORK, a corporation, INTER-MOUN-
TAIN ELECTRIC COMPANY, a corporation,
THE THOUSAND SPRINGS POWER COM-
PANY, a corporation, ELECTRIC INVEST-
MENT COMPANY, a corporation, L. M. PLUM-
MER and E. B. SCULL, Executors of the Estate
of L. L. McClelland, deceased, intervenors and
petitioners, Appellees.

Transcript of the Record

Upon Appeal from the United States District Court
for the District of Idaho, Southern Division

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Names and Addresses of Solicitors of Record:

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- S. H. HAYS, Boise, Idaho,
For Appellee Boise Title and Trust Company.
- KARL PAINE, Boise, Idaho,
For Appellee Guy I. Towle.
- S. H. HAYS and P. B. CARTER, Boise, Idaho,
For Appellee Great Shoshone and Twin Falls Water Power Company.
- MARTIN & CAMERON, Boise, Idaho,
For Appellees L. M. Plummer and E. B. Scull, Executors of the Estate of L. L. McClelland, deceased.
- EDWIN SNOW, Boise, Idaho,
For Appellee Lynch-Cannon Engineering Company.
- RICHARDS & HAGA, Boise, Idaho,
For Appellees Equitable Trust Company of New York, and Electric Investment Company.
- PARSONS & PARSONS, Salt Lake City, Utah,
For Appellees Intermountain Electric Company, and The Thousand Springs Power Company.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

GUY I. TOWLE, Complainant,

vs.

GREAT SHOSHONE AND TWIN FALLS WA-
TER POWER COMPANY, a corporation,

Defendant.

In Equity—No. 509.

BILL OF COMPLAINT.

“The Complainant, Guy I. Towle, a citizen and resident of the State of Idaho, brings this bill on his own behalf and on behalf of all creditors of the Great Shoshone and Twin Falls Water Power Company, who may hereafter join in the prosecution of this suit against the Great Shoshone and Twin Falls Water Power Company, a corporation, organized and existing under the laws of the State of Delaware, and a citizen of said State, and thereupon the Complainant complains and alleges as follows:

I.

That the Complainant is a resident and citizen of the State of Idaho, and of the District of Idaho, Southern Division, and resides in Lincoln County in said State.

II.

That the defendant is now, and at all the times hereinafter mentioned, was a corporation organized and existing under the laws of the State of Delaware, of which State it is a citizen, and having its statutory office at Wilmington, in said State, but has all of its property and carries on all of its business in the

State of Idaho, where it is duly licensed to carry on such business, having its principal office and place of business in Twin Falls County, Idaho, and that all of its property and principal office in said State of Idaho are situated in the Southern Division of the District of Idaho.

III.

That the defendant, Great Shoshone and Twin Falls Water Power Company, was organized under the laws of the State of Delaware on or about the 26th day of January, 1907, for the purposes, among others, of acquiring water powers, water rights and appropriations and other property and of acquiring and operating power stations and heating and lighting stations and their accessories and of dealing in water power, electrical power and electrical energy and apparatus, machinery and other property used or useful in connection therewith.

IV.

The Complainant is informed and believes and therefore alleges that the defendant has an authorized capital stock of One Million (\$1,500,000.00) Five Hundred Thousand Dollars, divided into fifteen (15,000) thousand shares of the par value of one hundred (\$100.00) Dollars each, all of which has been issued and is now outstanding.

V.

The Complainant is informed and believes and therefore alleges that on or about the 7th day of May, 1907, the defendant filed in the office of the Secretary of State of Idaho a duly authenticated copy of the

Certificate of Incorporation and an acceptance of the Constitution and Laws of the State of Idaho, and a designation of an agent in said State; that thereafter, the defendant proceeded to acquire lands and water powers in said State of Idaho, and to conduct its business in said State; that the defendant is now the owner of various parcels of real estate located at and near Shoshone Falls, in the County of Lincoln, and others at and near Lower Salmon Falls in the Counties of Gooding and Twin Falls, upon which are located power plants. It also owns water appropriations upon the Snake River at or near these points, and as well, an extensive distributing system whereby it supplies electric light, heat and power for domestic, commercial, irrigation and municipal purposes throughout that part of Southern Idaho east of and including Mountain Home and Grand View to Milner and Oakley.

VI.

That heretofore and on or about the 26th day of May, 1913, for moneys advanced to it, defendant made, executed and delivered to American Water Works and Guarantee Company, a corporation organized under the laws of the State of New Jersey, its demand promissory note dated on the said day, for the sum of Twelve Thousand (\$12,857.29) Eight Hundred Fifty-seven Dollars and Twenty-nine Cents, of which note Complainant thereafter became and now is the owner and holder, and that no owner or holder of said note ever was or is a citizen or resident of the State of Delaware; that payment of said

note has been duly demanded and there is now due and owing thereon to Complainant the sum of Twelve Thousand (\$12,857.29) Eight Hundred Fifty-seven Dollars and Twenty-nine Cents, with interest at the rate of Six (6%) Per Cent. per annum from May 26th, 1913.

VII.

That the Complainant is advised and believes and therefore alleges that the property of the defendant consists of certain bills and accounts receivable, amounting in the aggregate to not exceeding One Hundred (\$140,000.00) and Forty Thousand Dollars, whereof, however, a large part is of doubtful collectibility; cash on hand or in bank not exceeding Five Thousand (\$5,000.00) Dollars; and real estate, lands, power stations, water appropriations, distributing system and equipment of large actual and potential value; that Complainant is informed and believes and therefore alleges that the value of the property of defendant, if properly conserved and continuously operated, is greatly in excess of the amount of its liabilities; that said properties are at the present time profitably operated and produce a considerable income in excess of the cost of operation, and that the continued operation of its property is essential to the preservation of its value and in the public interest, and will result in an enhancement of the value of its assets.

VIII.

The Complainant is further informer and believes and therefore alleges that the defendant has made

heavy expenditures for the increase of its plant and equipment and has become heavily indebted therefor; that it is also indebted for supplies furnished in connection with its operation; that on account of the present conditions existing throughout the financial centers of the United States, due to the war now raging in Europe and other causes, the defendant has been and is now unable to obtain further credit or borrow further funds; that payment of moneys owing to the defendant has been delayed by the persons owing the same, and that more than Ninety Thousand (\$90,000.00) Dollars, due from companies to whom power has been furnished for pumping water for irrigation, are not collectible at the present time; that under these circumstances and because thereof, and for other reasons, a situation has resulted where the defendant, notwithstanding the great value of its properties, is and will be unable to meet its obligations and the interest thereon as they mature and become payable.

IX.

The exact amount of the indebtedness of the defendant is unknown to Complainant, but the Complainant is informed and believes and therefore alleges that the amount of said indebtedness is substantially as follows:

\$2,340,000.00 of First Mortgage Five Per Cent. Gold Bonds issued under and secured by a mortgage dated May 1, 1910, to the Trust Company of America, and James D. O'Neil as Trustee, which said bonds are dated May 1, 1910, and are payable May 1, 1950.

Of said First Mortgage Bonds, \$115,000.00 are outstanding in the hands of third parties, and the remainder, viz., \$2,225,000.00 in principal amount, are pledged as collateral to issues of the Company's Six Per Cent. Coupon Notes which have been issued and are outstanding to the amount of \$1,780,000.00. Said notes are of two issues, each secured by the deposit of First Mortgage Bonds of the Company under a collateral trust indenture to the Commonwealth Trust Company of Pittsburgh, as Trustee. Of said outstanding Six Per Cent. Coupon Notes, \$155,000.00 in principal amount became due and payable August 1, 1914, and are overdue and unpaid, and \$16,000.00 in principal amount became due November 1, 1914, and are overdue and unpaid, and an installment of interest upon certain of said notes, aggregating in principal amount \$48,750.00, fell due November 1, 1914, and still remains unpaid; and the defendant has refused payment of said notes and interest and is in default in the payment thereof.

Complainant is informed and believes and therefore alleges that the defendant is further indebted upon notes and accounts payable to an amount in excess of \$1,300,000.00, including the note held by Complainant, the greater portion of which is past due.

X.

The complainant is further informed and believes, and therefore alleges that many creditors of the defendant are pressing defendant for payment of their claims, and there is great danger that the said credi-

tors will bring suits upon the same to attach the property of the defendant and levy execution and in various ways enforce their respective claims; that unless this Court, in view of the financial embarrassment of the defendant as aforesaid, will deal with the property as a single trust fund and take it into judicial custody for the protection of every interest therein, there is great danger that the properties of the defendant may no longer be operated as a continuous system and enterprise; that action on the part of the creditors will result in judgments, executions and seizures by sheriffs or other like officers, and forced sales of the property of the defendant and interruption of the business of the defendant; that individual creditors will assert their remedies in different courts; that conflicts between creditors and between courts will be promoted; that a vast and unnecessary multiplicity of suits will result and that a great and irreparable injury and loss will be caused to the defendant and to its creditors; that should any of the creditors of the defendant succeed in the enforcement of their claims and thereby compel the defendant to suspend its business and become inactive, irreparable injury, damage and loss will be caused, not only to all the creditors of the defendant but to the public and to the communities and municipalities and the residents thereof to which defendant is now engaged in the supply of electric current for lighting, heating and power purposes; that the defendant and its properties may be placed in a position where it will be impossible to continue its de-

velopment and comply with the orders of the Public Utilities Commission of the State of Idaho; that waste and loss can be avoided and property preserved for the service of the public and for the equitable benefit of all those interested therein, only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a Receiver.

XI.

That under these circumstances, the intervention of a court of equity is imperatively required for the protection of the rights of the complainant and of all other parties in interest, especially for the timely appointment of a receiver to take charge of and preserve the property of the defendant, continue the operation of its undertaking, and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises.

XII.

That this is a civil suit in the nature of a claim in equity and the matter in dispute exceeds, exclusive of interest and costs, the sum of Five Thousand (\$5,000) Dollars.

XIII.

Inasmuch as the Complainant has no adequate remedy at law for his aforesaid grievance and can have relief only in equity, the complainant files this bill of complaint on behalf of himself and all other creditors of the defendant who may come in and contribute to the expenses of the suit and prays for equitable relief as follows:

(1) That the rights of the Complainant and of all other creditors of the defendant may be ascertained and decreed, and that the Court fully administer the property and funds in which the complainant is interested, and for such purpose marshal all the assets of the defendant and ascertain the several and respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of the creditors of the defendant as the same may be finally ascertained by the Court.

(2) That the Court forthwith appoint a receiver of all and singular the property and assets operated, held, owned or controlled by the defendant, including its land, and all equipment, materials, machinery, supplies, book accounts, choses in action, and assets of every description, wheresoever situated, belonging to the defendant, with full power and authority to take the same into his possession, and to hold, manage and operate the same, and to conduct the business now being conducted by the defendant; to collect and receive all the earnings, rents, issues, profits and income thereof, and to apply the said receipts under order of decree of the Court for such period as the Court shall order; with all the incidental powers ordinarily vested in receivers in like cases and with such additional powers as the Court may from time to time grant, and to incur such expenses as may be necessary or advisable for labor, supplies and materials, or otherwise, in connection with the administration of the assets and property of the defendant.

(3) That all creditors and stockholders and other persons be enjoined from instituting or prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity or under any statute against the defendant in any Court, wheresoever situated, and from levying any attachments, executions or other processes upon or against any of the properties of the defendant, or from taking or attempting to take into their possession the property or any part of the property of the defendant, and that the defendant, and its officers, directors, agents and employees, and all other persons, be enjoined and restrained from interfering with or hindering the taking into possession of the defendant's property by the said receiver and from transferring, selling, or disposing of any of the property or income of the defendant, or attempting to sell or dispose of the same in any manner.

(4) That at such times as may be found just and proper the properties of the defendant may be ordered to be sold as an entirety or in such parcels and at such places and in such manner and upon such terms and conditions as the Court shall deem just and equitable, and the proceeds of any such sale be distributed among those entitled thereto, or that the properties of the defendant, after satisfaction of the claims of creditors, may be returned to it, or that such other action may be taken in respect thereto as to the Court may seem proper, and as may be necessary to fully protect and enforce the rights and equities of the Complainant and of all other creditors of the defendant and other parties in interest.

(5) That this Court will grant unto the Complainant a writ of subpoena directed to the defendant, requiring the defendant to appear before this Court on a certain day therein named, and then and there to answer all and singular the matters therein set forth (but not under oath, an answer under oath being hereby expressly waived) and further to perform and abide by such further order, direction or decree as shall be made herein, and as to the Court shall seem meet.

(5) That the Complainant have such other and further relief as to the Court may seem just and equitable.

And the Complainant will ever pray, etc.

(Signed) N. M. RUICK,
Solicitor for Complainant.

Filed Nov. 2, 1914.

A. L. Richardson, Clerk.

(Title of Court and Cause.)

Equity No. 509.

ORDER APPOINTING RECEIVER.

This cause came on to be heard and, after hearing counsel and the defendant consenting thereto, and it appearing that it is necessary for the protection and preservation of the respective rights and equities of the complainant and all other creditors of the defendant that the property and business of the defendant be preserved, operated and administered in this suit through a receiver to be appointed by this Court.

and that it is necessary that a receiver of the defendant and its property should be appointed forthwith and with powers herein granted; it is, after consideration, hereby

Ordered, adjudged and decreed that William T. Wallace, of Twin Falls, in the State of Idaho, be and he hereby is appointed receiver of the Court of the defendant Great Shoshone and Twin Falls Water Power Company and of all and singular the property, lands, plants, system, franchises, rights, claims, interests and assets of the said defendant of every name and nature and wheresoever situated, and he is hereby authorized forthwith to take possession thereof and to preserve, manage, operate and use the same and to conduct and carry on the operation of the hydro-electric power system and other business and properties of the defendant in such manner and to such extent as in his judgment is necessary and desirable and to exercise all authority, franchises and privileges of the defendant. The said receiver is authorized and directed to collect all moneys and other properties due and to become due to said Great Shoshone and Twin Falls Water Power Company; to institute and prosecute such suits in his own name as receiver or in the name of the Company or otherwise as he may be advised or as may be now pending in behalf of the Company, and to defend such suits as may be brought against him and those now pending or hereafter brought against the defendant which affect or may affect the property, rights and franchises of which he is or may become receiver.

Said receiver is also authorized and is hereby given full power and authority in his discretion to appoint and employ such agents, attorneys, officers, managers and employees as shall be necessary to aid him in the proper discharge of his duties; and it is

Further ordered, adjudged and decreed that the defendant and all persons, firms and corporations in possession of any of the property of the defendant forthwith deliver the same to the receiver; and the said defendant and the officers, directors, agents, attorneys and employees thereof and all other persons, firms and corporations whatsoever are hereby restrained and enjoined from interfering with, attaching, levying upon, seizing or in any manner whatsoever distributing any portion of the properties, rights and franchises of the defendant, or taking possession thereof or in any manner interfering with the same or any part thereof without the consent of the receiver, and from interfering in any manner with or preventing the discharge by said receiver of his duties or his operation and management of said properties and premises under the order of this Court; and it is

Further ordered, adjudged and decreed that the said receiver shall retain possession and continue to discharge the duties and trusts aforesaid until further order of this Court in the premises and that he shall from time to time apply to this Court for such other and further order and direction as he may deem necessary and requisite to the due administration of said trust; and it is

Further ordered, adjudged and decreed that within five days from the date of this order the said receiver shall execute and file with the Clerk of this Court a bond with one or more sureties, approved by this Court in the penal sum of Twenty-five Thousand Dollars (\$25,000), conditioned upon the faithful discharge of his duties, and to account for all funds coming into his hands and to abide by and perform all things which he shall be directed by the Court to do.

Dated November 2, 1914.

FRANK S. DIETRICH,
District Judge.

Filed Nov. 2, 1914.

A. L. Richardson, Clerk.

(Title of Court and Cause.)

Equity No. 509.

CLAIM OF AMERICAN WATER WORKS AND
ELECTRIC COMPANY.

State of New York,
County of New York,
City of New York,—ss.

On this 30th day of July, 1915, before me, the undersigned, personally appeared Sturt H. Patterson, personally known to me, who being by me duly sworn, deposes and says:

That he is the Vice-President and Treasurer of The American Water Works & Electric Company, Incorporated, hereinafter called the claimant, and its duly authorized agent in the making of this affi-

davit, and that The Great Shoshone & Twin Falls Water Power Company, the defendant in the above entitled cause, is justly indebted unto the claimant on account of the matters and things hereinafter mentioned and in the amounts hereinafter set forth, with interest thereon, to-wit:

First. On open book account of the defendant company unto the American Water Works & Guarantee Company in the sum of Five Hundred Fifty-one Thousand Seven Hundred Seventy-six Dollars Sixty-two Cents (\$551,776.62) with interest thereon from July 7th, 1913, duly assigned and transferred for a valuable consideration unto the claimant herein.

Said book account is exceedingly voluminous as its various items are on account of numerous charges made against the defendant company by said Guarantee Company on account of the construction and equipment of the power projects and transmission lines and systems of the defendant company by said Guarantee Company extending over a period of about six (6) years, and of charges made for advances by said Guarantee Company, to said defendant company for the purposes aforesaid and in the financing of the defendant company, all of which the defendant company promised to pay unto said Guarantee Company but which it has failed to do; that a complete transcript thereof would fill many dozens of pages of closely typewritten matter and your affiant is informed that the furnishing of such transcript would on that account be unnecessary and unnecessary for the further reason that the books of the defendant

company show it to be indebted unto said Guarantee Company on account of the matters in this paragraph mentioned in the amount hereinbefore given.

Second. That the defendant company is further indebted unto the claimant herein on account of expenditures made by the receivers of the American Water Works and Guarantee Company under orders of the court of their appointment authorizing the making of the same and which were made at the special instance and request of the defendant company, and which the defendant company promised to repay but has failed so to do, with interest on said expenditures and advances at six per cent (6%) per annum from the dates next hereinafter mentioned, at which time such expenditures and advances were made and an itemization of which is as follows:

July 22, 1913.....\$ 19.02

Sept. 19, 1913..... 2,500.00

Oct. 24, 1913..... 2,500.00

That the said claims have been duly assigned to the claimants herein for a valuable consideration and are justly owing unto it by the said defendant company.

Third. That defendant company is further indebted unto the claimant herein on account of a certain promissory note of the defendant company, dated June 15, 1913, in the sum of Thirty-eight Thousand Two Hundred Forty-one (\$38,241.00) Dollars bearing interest at six per cent (6%) per annum, less a credit entered on this note July 2, 1914, in the sum of Twenty Thousand (\$20,000) Dollars. The said

note was payable to the order of said Guarantee Company, duly endorsed for transfer, and was acquired by claimant for valuable consideration and is now held by claimant.

Fourth. That the defendant company is further indebted unto the claimant herein in the sum of Sixty-seven Thousand Five Hundred Ninety Dollars and Fifty-eight Cents (\$67,590.58) with interest thereon from the 7th day of July, 1913, on account of the following matters and things:

That in July, 1913, the American Water Works & Guarantee Company in the suit of Frank G. Glover et al. vs. said company in the District Court of the United States for the Western District of Pennsylvania, was placed in the hands of receivers under an order of said court and at that time that company had on deposit with various banks the sum of Sixty-seven Thousand Five Hundred Ninety Dollars and Fifty-eight Cents (\$67,590.58) and said banks held the unsecured promissory notes of the defendant company (all maturing within six (6) months from July 7, 1913) payable to the order of said American Water Works & Guarantee Company to the aggregate amount of Three Hundred Thirty-three Thousand Six Hundred Forty-three Dollars Seventy-one Cents (\$333,643.71) in their principal sums, the same having for a valuable consideration been delivered to said Guarantee Company and by it endorsed and discounted with said banks.

That the aforesaid sum of money belonging to said Guarantee Company was on July 7, 1913, impounded

by the banks holding said funds on deposit and was by said banks applied to payment *pro tanto* of the sums owing to said banks holding such notes.

That the amount for which claim is hereinbefore made were acquired by claimant at a public sale of all of the property and assets of said American Water Works & Guarantee Company as an entirety in the above entitled cause against said company in the United States District Court for the Western District of Pennsylvania under a decree of sale made on April 16, 1914, which decree of sale was made absolute by an order entered in said suit on the 28th day of April, 1914, and pursuant to which a deed was executed and delivered under date of May 1, 1914, unto claimant for all of the property and assets of said Guarantee Company.

That in and by said deed there was thus transferred to the claimant herein all of the claims of the said Guarantee Company hereinbefore referred to and of its receivers against the defendant herein, and on account of the purchase by the claimant of said property and assets of said Guarantee Company and the deed conveying the same, the claimant herein is entitled not only to reimbursement for the amount referred to in this paragraph but to payment by the defendant of the other items hereinbefore claimed with interest thereon as stated.

Fifth. That the defendant Company is further indebted unto the claimant herein in the sum of One Hundred Five Thousand Seven Hundred Three Dollars and Ninety Cents (\$105,703.90) with interest

thereon at six per cent (6%) per annum from April 30, 1914, advanced to the defendant company at its special instance and request by the Stockholders Protective Committee of said Guarantee Company and which the defendant company promised to repay but has failed so to do.

That the above mentioned claim of said Stockholders Protective Committee was duly assigned unto the claimant herein and the amounts now represented by this claim are justly due and owing unto the claimant herein.

Sixth. That the said defendant company is further indebted unto the claimant herein in the sum of Eleven Thousand Eight Hundred Eighty-eight Dollars and Thirty-seven Cents (\$11,888.37), less rebates allowed amounting to Six Hundred Eighty-one Dollars and Fifty-eight Cents (\$681.58) and protest fees amounting to Eleven Dollars and Forty-six Cents (\$11.46), a total of Eleven Thousand Two Hundred Eighteen Dollars and Twenty-five Cents (\$11,218.25) being in payment of interest as adjusted as of April 30, 1914, with the banks then holding the promissory notes of the defendant company hereinbefore mentioned and which payment was advanced by claimant unto defendant company at the special instance and request of the defendant company and which the defendant company promised to repay but has failed so to do, and which amount of Eleven Thousand Two Hundred Eighteen Dollars and Twenty-five Cents (\$11,218.25) with interest thereon from the eleventh day of August, 1914, at

six per cent (6%) per annum, is still due and owing unto the claimant.

Seventh. That the defendant is further indebted unto the claimant herein in the sum of Three Hundred Twenty-two Thousand Three Hundred Dollars (\$322,300) on account of the following matters and things:

That three of the promissory notes of the defendant company referred to in paragraph Fourth hereof were in July, 1913, substituted with three new notes of the defendant company for like amounts with accrued interest to the date of substitution and these new notes so issued in substitution were issued and dated on the following dates and for the following amounts:

July 25, 1913.....\$30,251.78

July 28, 1913..... 34,693.91

July 29, 1913..... 36,725.69

All of these notes so issued in substitution were made payable to the order of said Guarantee Company and were by it endorsed for transfer pursuant to an order of said United States District Court for the Western District of Pennsylvania in the above entitled cause against said company and were delivered to the bank holding the notes for which the new notes were issued in substitution.

That between the 15th day of May, 1914, and the 31st day of August, 1914, said new notes so issued in substitution and the then remaining notes referred to in paragraph Fourth thereof, were substituted with new notes of the defendant company to the ag-

gregate amount of Two Hundred Sixty-seven Thousand Five Hundred One Dollars and Ninty-three Cents (\$267,501.93) and at the request of the defendant company and deposited as collateral security for the payment of the principal and interest of the said new notes so issued in substitution, the sum of Three Hundred Twenty-two Thousand Three Hundred Dollars (\$322,300) at par of its collateral trust 20-year five per cent Gold Bonds of the claimant, dated April 1, 1914, and issued under and secured by its Deed of Trust unto the Bankers Trust Company of the City of New York, which bonds under the terms of such new notes so issued in substitution may be sold by the holders of said notes upon non-payment of the principal thereof, any of which notes may be made due and payable by the respective holders thereof upon non-payment at any semi-annual date, August 1st or February 1st of each year, in event of default in payment of interest then maturing. The aforesaid notes so given by the defendant in substitution are all dated as of the first of February, 1914, and are by their terms due and payable on or before two years from that date.

That owing to the insolvency of the defendant company and the pending foreclosure of its mortgage, dated May 1, 1910, unto the North American Trust Company and James D. O'Neil, Trustees, the present trustees thereunder being The Equitable Trust Company of New York and F. R. Babcock, securing bonds outstanding thereunder to the aggregate amount of Two Million Three Hundred Forty Thousand Dollars

(\$2,340,000) in their principal sums, the par value of the above bonds will be lost to the claimant herein as the defendant company will be utterly unable to make payment either of principal or interest upon said notes and which said bonds will be sold to enforce the security of said notes, and on that account the defendant company is justly indebted unto the claimant for the par value of said bonds of the claimant amounting to Three Hundred Twenty-two Thousand Three Hundred Dollars (\$322,300), together with interest accruing thereon from April 1, 1915, to which date interest on said bonds has been paid.

Eighth. That defendant company is further indebted unto the claimant herein in the following amounts with interest thereon from the following dates:

October 5, 1914.....	\$4,093.71
January 31, 1915.....	8,025.03
July 30, 1915.....	8,025.03

These amounts are due on account of interest payments made by the claimant upon the above mentioned notes of the defendant company referred to in paragraph Seventh hereof, and which the claimant has found it necessary to pay on account of its having deposited its bonds as collateral security for the payment of said notes. Interest is due unto claimant upon the above mentioned amounts from the date of said respective payments at the rate of six per cent (6%) per annum.

Ninth. The defendant company is further indebted unto the claimant herein in the amounts next here-

inafter set forth with interest thereon from the respective dates of the assignments hereinafter mentioned, at six per cent (6%) per annum, on account of the assignment to the claimant herein of open book accounts of the following named companies against said defendant company:

Southern Idaho Telephone Company, Limited,

Amount of account assigned.....\$ 117.38

Assignment dated October 22, 1914.

Twin Falls North Side Land & Water Company,

Amount of account assigned..... 114,024.19

Assignment dated July 3, 1914.

Twin Falls Salmon River Land & Water Company,

Amount of account assigned..... 5,529.95

Assignment dated June 4, 1914.

Twin Falls North Side Investment Co., Limited,

Amount of account assigned..... 29,029.27

Assignment dated October 2, 1914.

North Side Canal Company, Limited,

Amount of account assigned..... 32.59

Assignment dated September 2, 1914.

The aforesaid accounts were acquired by claimant for a valuable consideration and are justly due and owing unto it.

Tenth. The defendant company is further indebted unto the claimant herein in the sum of Eleven Thousand Seven Hundred Twenty-five Dollars and Fifty-two Cents (\$11,725.52) with interest thereon at six per cent (6%) per annum from June 8th, 1914, on account of the following matters and things:

On the date last mentioned the defendant company

executed and delivered its four certain promissory notes dated June 8, 1914, each for the sum of Two Thousand Nine Hundred Thirty-one Dollars and Thirty-eight Cents (\$2,931.38) each to the order of Slick Brothers Construction Company, Limited, all of which have been acquired by the claimant herein for a valuable consideration and are now held by it, each of which notes is of like tenor and date and is duly endorsed for transfer.

Eleventh. That defendant company is further indebted unto the claimant herein on items of open book account in the sum of Twenty-five Thousand Five Hundred Thirteen Dollars and Four Cents (\$25,513.04) appearing on statement of account hereto attached and marked "Exhibit A" and which items are not included in any of the items upon which proof of claim has hereinbefore been made after allowing credits on such sum last named to the amount of Nineteen Thousand Six Hundred Thirty Dollars and Forty-two Cents (\$19,630.42), leaving a net balance on account of the matters in this paragraph referred to of Five Thousand Nine Hundred Eighty-two Dollars and Sixty-two Cents (\$5,982.62). This statement of account includes all items upon which proof has hereinbefore been specifically made except those set forth in paragraphs Third, Seventh and Tenth hereof.

Affiant further states that the amounts for which claim is hereby made are justly due and owing unto the claimant by defendant company and that there are no set-offs or counter-claims against any of the

same other than hereinbefore specifically set forth and other than as set forth in said Exhibit A.

STEWART H. PATTERSON.

Sworn and subscribed to before me this 30th day of July, 1915.

A. G. SWAN,
Notary Public.

EXHIBIT A.

GREAT SHOSHONE & TWIN FALLS WATER
POWER CO. JULY 30, 1915.

In account with
AMERICAN WATER WORKS & ELECTRIC CO.,
Inc.

1913

July 7—Balance Open Account to A. W.

W. & G. Co. \$551,776.62

Sept. 30—Advances by Receivers of A.

W. W. & G. Co. 2,500.00

Oct. 31—Advances by Receivers of A. W.

W. & G. Co. 2,500.00

1914

Apr. 30—Advances by Receivers of A.

W. W. & G. Co. 19.02

Apr. 30—Cash advanced to Common-

wealth Trust Co. 105,703.90

Apr. 30—Cash of A. W. W. & G. Co. im-

pounded and applied on notes of Gt.

Sho. & T. F. W. P. Co. by banks. 67,590.58

Apr. 30—Interest and protest fees on

bank loans to 5/1/14. 11,218.25

32 *American Water Works & Electric Co. vs.*

June 4—Book account of T. Falls, Salmon River L. & W. Co. against Gt. Sho. & T. F. W. P. Co. assigned.....	5,529.95
June 5—W. L. Clark Co., Insurance....	324.85
Ed Ball Agency Premium on Fulton Bond	10.00
Westinghouse Elec. & Mfg. Co., Interest on Note	86.25
June 26—Westinghouse Elec. & Mfg. Co., Interest on Notes.....	84.33
July 23—Book account of T. Falls No. Side L. & W. Co. against Gt. Sho. & T. F. W. P. Co., assigned	114,024.19
Aug. 18—Evening Post Printing Office, Printing	115.25
Aug. 18—Evening Post Printing Office, Printing	28.00
Sept. 2—Book account of the North Side Canal Co., Ltd., against Gt. Sho. & T. F. W. P. Co., assigned.....	32.59
Sept. 29—Westinghouse Elec. & Mfg. Co., Interest on Notes	191.34
Oct. 2—Book account T. Falls No. Side Investment Co., Ltd., against Gt. Sho. & T. F. W. P. Co., assigned.....	29,029.27
Oct. 5—Interest on Bank Loans to 8/1, 1914	4,093.71
Oct. 22—Book account Sou. Idaho Telephone Co., Ltd., against Gt. Sho. & T. F. W. P. Co., assigned.....	117.38

Oct. 28—Delaware Trust Co., Stock Transfer Book	2.00
Oct. 5—Westinghouse Elec. & Mfg. Co., Interest on Notes	64.62
Oct. 5—Chubb & Son, Insurance.....	.20
Oct. 5—Kirkland & Yardly, Insurance..	106.50
Oct. 31—Amounts paid out under con- tracts of Gt. Sho. & T. F. W. P. Co., dated July 29 and 31, 1914, guaran- teed by A. W. W. & E. Co., Inc.	24,497.50
Nov. 16—Chubb & Son, Insurance.....	.10
Dec. 23—Filing Annual Report.....	2.00

1915

Jan. 31—Interest on Bank Loans to Feb. 2, 1915	8,025.03
Feb. 16—Chubb & Son, Insurance.....	.10
July 30—Interest on Bank Loans to Aug. 1, 1915	8,025.03

Less following credits:

1914

Apr. 30—On account assignment claim against Twin Falls Oakley Land & Water Company	5,056.28
July 22—On account assignment claim against Idaho Southern Railroad Co..	14,571.59
Sept. 3—Received from R. L. Kester on account	2.55

Endorsed: Filed August 9, 1915.

A. L. Richardson, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Equity No. 509.

ORDER ALLOWING CLAIM OF AMERICAN
WATER WORKS AND ELECTRIC COM-
PANY.

It appearing to the Court that claims against the estate of the defendant above named have been filed herein as required by order of this Court with respect thereto, among which was that of American Water Works and Electric Company, and it also appearing that thereafter it was by the Court ordered that any person interested and so desiring should on or before January 17, 1916, file objections to any claim and join issue thereon and that trial of such issues should be had on February 14, 1916; and it further appearing on said February 14, 1916, that no objection had been made to the claim of American Water Works and Electric Company filed as hereinbefore mentioned, the same on that day was, in open Court, and is now allowed and approved.

FRANK S. DIETRICH,

November 3rd, 1916.

District Judge.

Endorsed: Filed Nov. 3rd, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Equity No. 509.

STATEMENT ON HEARING OF PETITION OF
BOISE TITLE AND TRUST COMPANY FOR
PREFERENCE AND INDEMNITY.

BE IT REMEMBERED: That on the 8th day of

April, 1916, the Boise Title and Trust Company presented to the Court and filed herein its petition for preference and indemnity herein, which petition is in words and figures as follows:

(Title of Court and Cause.)

"To the Judge of the District Court of the United States, for the District of Idaho.

Comes now the Boise Title and Trust Company, a corporation organized and existing under the laws of the State of Idaho, and represents to and petitions the Court as follows:

1. That the Boise Title and Trust Company is a corporation duly organized and existing under the laws of the State of Idaho, and was such corporation at all of the times hereinafter mentioned; that it is a part of the business of the corporation to become surety upon bonds of the character hereinafter mentioned.

2. That on the 8th day of June, 1914, and for a long time prior and subsequent thereto, the defendant, the Great Shoshone and Twin Falls Water Power Company, was a corporation duly organized and existing under the laws of the State of Delaware and duly empowered to do business in the State of Idaho.

3. That during said time, it was the owner of an electric power plant located at Lower Salmon Falls in Gooding County, State of Idaho, and a power plant situated at Shoshone Falls in Lincoln County, State of Idaho, and upwards of two hundred miles of transmission lines extending from Oakley, Idaho, to Mountain Home, Idaho, in an easterly and westerly

direction and from Hollister to Shoshone, in the State of Idaho, in a northerly and southerly direction, and that a considerable portion of said transmission lines were situated in said Lincoln County.

4. That prior to the month of April, 1914, the Shoshone Light and Power Company, a corporation, owned and operated an electric light and water works system in the town of Shoshone, in said Lincoln County, State of Idaho.

That prior to said month of April, a contract was made between the said Shoshone Light and Power Company and the Great Shoshone and Twin Falls Water Power Company, a copy of which contract has been filed in these proceedings and is hereby referred to and made a part hereof; that under the terms of said contract, the property of said Shoshone Light and Power Company, consisting of an electric light plant and a waterworks plant, was to be sold to the Great Shoshone and Twin Falls Water Power Company under certain conditions; that a deed for said property had been theretofore placed in escrow for delivery to the Great Shoshone and Twin Falls Water Power Company upon payment by it of the purchase price of said property;

That under the terms of said contract, a portion of the income from said property was to be applied to operating expenses and the balance of the funds were to be applied upon the purchase price of the property until the full amount thereof had been paid as will more fully appear by said contract;

That prior to the month of April, 1914, the Great

Shoshone and Twin Falls Water Power Company took possession of said property under said contract belonging to the Shoshone Light and Power Company and collected and received all the income therefrom, said income being applied as hereinbefore stated.

5. That during said period while said Great Shoshone and Twin Falls Water Power Company was in possession of the said property of the Shoshone Light and Power Company and operating the same, an accident occurred whereby a certain building and the contents belonging to one J. W. Newman was destroyed by fire; that it was claimed by said Newman that the destruction of said building was occasioned by the faulty construction of the power lines of the Shoshone Light and Power Company, and the improper maintenance and operation thereof by the Great Shoshone and Twin Falls Water Power Company as will more fully appear by a copy of the complaint filed by said Newman in the District Court, in and for Lincoln County, a copy of which said complaint is hereunto attached and made a part hereof and marked Exhibit "A."

6. That in the said suit in which said complaint above mentioned was filed, said J. W. Newman recovered judgment against the Great Shoshone and Twin Falls Water Power Company in the sum of ten hundred seventy-nine and eighty hundredths (\$1079.80) dollars, said judgment being rendered on the 23rd day of April, 1914; that said judgment thereupon became a lien upon all of the property of the Great Shoshone and Twin Falls Water Power

Company situate in the said Lincoln County, including such interest as the Great Shoshone and Twin Falls Water Power Company had in the property of the Shoshone Light and Power Company; that the Great Shoshone and Twin Falls Water Power Company desired to appeal from said judgment and the said J. W. Newman threatened the issuance of execution in said action; that the said Great Shoshone and Twin Falls Water Power Company desired to prevent the issuance of any execution and to obtain the release of the judgment lien procured in said case.

7. That said Great Shoshone and Twin Falls Water Power Company on or about the 8th day of June, 1914, requested the Boise Title and Trust Company to execute a surety bond for the purpose of preventing the levy of an execution upon the property of the said company and for the purpose of an appeal in said cause;

That the said Boise Title and Trust Company, petitioner herein, at the said request of the said defendant, did on the 8th day of June, 1914, execute the bond, a copy of which is hereto attached and made a part hereof and marked Exhibit "B," that the request for the execution of said bond was made and said bond was executed within six months prior to the appointment of a receiver herein; that the said Great Shoshone and Twin Falls Water Power Company was at the time of making said request and at the time of issuing said bond and at all times prior to the month of July, 1915, the owner of all of the

bonds issued by the Great Shoshone and Twin Falls Water Power Company, and that there were at that time no bonds of said company outstanding except such as were owned by said company, and that said request for the execution of said bond was made for the protection and benefit of said bonds and the owner thereof; that prior to said time, said bonds had been pledged to secure an issuance of notes of the said Great Shoshone and Twin Falls Water Power Company; that by preventing the levy of an execution, the Great Shoshone and Twin Falls Water Power Company was permitted to obtain title to the property of the Shoshone Light and Power Company under the terms of the contract hereinbefore mentioned; that in the month of July, 1915, a default having occurred in the payment of the interest or principal of some of said notes secured by a pledge of said bonds, said bonds were sold to satisfy said pledge; that such sale was after the appointment of the receiver herein and was without notice to him, and without notice to this Court and also without notice to the petitioner herein.

8. That the Great Shoshone and Twin Falls Water Power Company was at all times subsequent to the year 1913, a subsidiary corporation of the American Waterworks and Electric Company, said last-named company holding seventy per cent or more of the stock of said corporation and being in charge of its financial affairs.

That about the month of February or March, 1915, an understanding was had between said American

Water Works and Electric Company and other electrical interests whereby plans for a proposed merger of the interests were tentatively or otherwise agreed upon and that the sale of the said bonds in satisfaction of said pledge was made in pursuance of said reorganization arrangement.

9. That the Supreme Court of the State of Idaho on or about the 24th day of March, 1916, affirmed the decision of the District Court, in and for Lincoln County, in the said suit in which J. W. Newman was plaintiff against the Great Shoshone and Twin Falls Water Power Company; that petitioner will now be required, under the terms of said decision, to make payment upon the said bond.

10. That at the time of the execution of said bond, the American Water Works and Electric Company had a manager in charge of said property of the Great Shoshone and Twin Falls Power Company and who was directing the affairs thereof, and that said bond was executed by the said manager as Manager of said Great Shoshone and Twin Falls Water Power Company as more fully appears by said Exhibit "B."

That the merger of electric properties arranged for between the American Water Works and Electric Company and other electrical interests has been fully consummated and said property is now owned and operated, together with other power properties, by the Electric Investment Company.

That after the sale of said bonds for the satisfaction of said pledge, a suit for foreclosure was brought in this Court upon said bonds and the trust deed

securing the same, which suit is entitled "The Equitable Trust Company vs. Great Shoshone and Twin Falls Water Power Company, et al., No. 526, in this Court, to which suit and the proceedings therein reference is hereby made; that said suit was one of the means used on behalf of the American Water Works and Electric Company to carry the said merger of the power properties into effect, including the properties of the defendant company.

11. That at the time of the accident mentioned in the complaint, Exhibit "A," and at the time of the entering of the judgment in the suit above mentioned, and at the time of the execution of the bond, the contract between the Great Shoshone and Twin Falls Water Power Company and the Shoshone Light and Power Company was in force and effect and was being carried out by payments made out of the income from said property; that said property was purchased and paid for from the income derived therefrom in pursuance of the contract to which reference is hereby made.

12. That the said Great Shoshone and Twin Falls Water Power Company at the time of the rendition of said judgment and the threatened issuance of execution had on hand funds used for the payment of employees and for the repair and up-keep of the property, which funds were subject to levy under said execution; that it also had on hand at said time, equipment of a greater value than the amount of said judgment, which said equipment was after said time added to the property and included in the receiver's sale.

Wherefore, Petitioner prays that the receiver herein be required to liquidate the obligation on said bond and to pay and discharge the judgment rendered and entered in the aforesaid case in the District Court of the Third Judicial District of the State of Idaho, wherein J. W. Newman was plaintiff and the said Great Shoshone and Twin Falls Water Power Company was defendant, and that the receiver save your petitioner harmless from all costs and liabilities on account of the giving of said bond.

BOISE TITLE AND TRUST COMPANY,
By S. H. Hays, President,
Petitioner.

EXHIBIT "A."

*In the District Court of the Fourth Judicial District
of the State of Idaho, in and for the
County of Lincoln.*

J. W. NEWMAN, Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation,
Defendant.

COMPLAINT.

Plaintiff complains of the defendant and for cause of action alleges:

1.

That at all times hereinafter mentioned the defendant was, and now is, a corporation organized and existing under and by virtue of the State of Delaware.

2.

That the plaintiff at all times hereinafter mentioned was, and now is, the owner of a portion of Block Forty (40) of the Town of Shoshone, Lincoln County, State of Idaho, and that up to and including the 11th day of April, 1913, the said defendant was the owner of a certain corrugated iron barn situated on said premises, which said barn was of the reasonable worth and value of \$650.00, and the said plaintiff, up to and including the last-named date was the owner of certain personal property located in said barn, described as follows:

One team of horses of the reasonable worth and value of.....	\$ 300.00
One ton of oats of the reasonable worth and value of	30.00
One ton of hay of the reasonable worth and value of	8.00
Two sets of harness of the reasonable worth and value of	70.00
Thirteen pack outfits of the reasonable worth and value of.....	156.00
Seven riding saddles of the reasonable worth and value of.....	175.00
Seventy-five sheep pelts of the reasonable worth and value of.....	66.25
150 ft. of cotton hose of the reasonable worth and value of.....	15.00
Three screen doors of the reasonable worth and value of.....	3.00

Horseshoeing outfit of the reasonable worth and value of	12.00
Ten tents, at \$10.00, of the reasonable worth and value of.....	100.00
Making a total reasonable worth and value of said property of.....	<hr/> \$1,586.00

3.

That in the year 1914 the Shoshone Light & Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, secured a franchise from the Village of Shoshone, Lincoln County, State of Idaho, for a term of years permitting said company to build, maintain and operate poles, wires, stations and appurtenances thereto, for the purpose of carrying on an electric light and power business within the said town of Shoshone, Idaho. That in the year 1904, pursuant to the terms of said franchise, and in furtherance of their said business, the said Shoshone Light & Water Company erected poles along the streets and alleys of the said town of Shoshone and strung along the said poles a system of wires, appurtenances and appliances charged with a dangerous and life destroying force and current, known as electricity, and that said poles and wires were strung along Boise Street in said Village of Shoshone.

4.

That the said Shoshone, Light & Water Company owned, maintained and operated the said electric light and power system up to and including on or about July 1, 1912, at which said time the defendant,

Great Shoshone & Twin Falls Water Power Company purchased and took over from the said Shoshone Light & Water Company said system in its entirety, together with the franchise owned by the said Shoshone Light & Water Company, and the said Great Shoshone & Twin Falls Water Power Company has during all the time since on or about July 1, 1912, up to and including the date hereof, maintained and operated the said electric light and power system, a part of which is the maintenance and operation of the said system appurtenances and appliances, charged with a dangerous and life destroying force and current, known as electricity, along Boise Street in said Village of Shoshone, Lincoln County, State of Idaho.

5.

That during the fall of 1911, the said Shoshone Light & Water Company, desiring to extend their said system of wires from the north side of Boise Street at a point opposite Block Forty (40) in the town of Shoshone, Lincoln County, State of Idaho, to a point on the south central part of Block Fifty (50), town of Shoshone, Lincoln County, State of Idaho, but not for the use or benefit of this plaintiff herein, extended its wires diagonally across the said Block Forty (40), and across the property of this plaintiff herein, that the said Shoshone Light & Water Company carelessly failed and neglected to erect suitable poles or any pole at all to carry said wires from the said point on Boise Street to the said point in Block Fifty (50), but in direct contravention of the rights

of this plaintiff herein, and without the knowledge of, permission or consent of the plaintiff, the said Shoshone Light & Water Company attached said wires to the said plaintiff's corrugated iron barn, running the same lengthwise along the side of said barn at a distance of only about two inches from the side of the said barn. That the said Shoshone Light & Water Company, its agents and servants, carelessly and negligently fastened the said wires to the side barn, leaving the same loose and swaying, thereby through their said negligence and carelessness, permitting said wires to come in contact with the side of plaintiff's said barn.

6.

That from and after on or about July 1, 1912, the date of the purchase of said light and power system, together with the poles, wires and appurtenances thereto, from the said Shoshone Light & Water Company by the Great Shoshone & Twin Falls Water Power Company, up to and including April 11, 1913, the said Great Shoshone & Twin Falls Water Power Company negligently and carelessly maintained and operated the said wires, poles and appurtenances which extended from the north side of Boise Street across said Block Forty (40) to a point in said Block Fifty (50), and which were attached to the side of said plaintiff's barn in a careless and negligent manner by carelessly and negligently, without any fault of the plaintiff herein, permitting said wires to remain loose and sway and strike against the side of said plaintiff's barn, and the said defendant negli-

gently and carelessly failed to exercise and use proper care, diligence and skill in operating, inspecting and maintaining said plant, wires and other appurtenances and appliances and system of wires, and carelessly and negligently operated and permitted its said wires to remain attached to the said plaintiff's barn, without having the said wires properly insulated, attached and fastened.

7.

That by reason of the said Shoshone Light & Water Company, its agents, employes and servants, failing to exercise and use proper care, diligence, material and skill in putting in the said plant, wires and other appurtenances as aforesaid, and by reason of the defendant, its agents, employes failing to exercise and use proper care, diligence, material and skill in operating, inspecting and maintaining its plant, wires and other appurtenances as aforesaid, defendant did, on the 11th day of April, 1913, and without fault of the plaintiff, negligently and carelessly permit a current of electricity to pass from the said wires into and through the side of plaintiff's said barn, said current thereby coming in contact with said barn and the contents thereof, and did thereby set fire to said barn and the contents thereof, which said fire wholly and totally burned up and destroyed all of the said personal property as described in paragraph two hereof, together with the said barn, to the plaintiff's damage in the sum of \$1,586.00.

Wherefore plaintiff prays judgment against the defendant for the sum of \$1,586.00, together with

Great Shoshone and Twin Falls Water Power Company, a corporation, as principal, and the Boise Title and Trust Company, a corporation organized and existing under the laws of the State of Idaho, as surety, do hereby jointly and severally undertake and promise on the part of the defendant, that the said defendant will pay all damages and costs which may be awarded against it on said appeals or on a dismissal thereof, not exceeding \$300.00, to which amount we acknowledge ourselves jointly and severally bound; and,

WHEREAS, the defendant is desirous of staying the execution of the said judgment so appealed from, we do further in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of \$2,159.60, gold coin of the United States, being double the amount named in the said judgment that if the said judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, the defendant will pay in the United States gold coin the amount directed to be paid by the said judgment, or a part of such judgment as to which such judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the defendant upon the appeal, and that, if the defendant does not make such payment within thirty days after the filing of the remittitur from the Supreme Court in the Court from which the appeal is taken, judgment may be entered on motion of the plaintiff in his favor against

the undersigned principal and surety for said sum of \$1,079.80, together with the interest that may be due thereon and the damages and costs which may be awarded against the defendant upon the appeal.

WITNESS our hands and seals this 8th day of June, 1914.

GREAT SHOSHONE & TWIN FALLS
WATER POWER CO.,

By WM. T. WALLACE.

BOISE TITLE AND TRUST COMPANY,

By W. J. ABBS,

Secretary.

State of Idaho,

County of Ada,—ss.

S. H. HAYS, being first duly sworn, deposes and says that he is the President of the Boise Title and Trust Company; that said Boise Title and Trust Company is a corporation duly organized and existing under the laws of the State of Idaho under Sections 2961 to 2967 of the Revised Codes of said State.

S. H. HAYS.

SUBSCRIBED AND SWORN to before me this 8th day of June, 1916.

(Seal)

MARGARET RYAN,

Notary Public.

That leave to file the same was thereupon granted by the Court and hearing thereon was set for April 6, 1916. The said petition was thereupon filed in accordance with such permission and the following notice was given to William T. Wallace and the various attorneys appearing on behalf of creditors and others in the above entitled cause:

(Title of Court and Cause.)

NOTICE.

TO WILLIAM T. WALLACE, Receiver, and the various attorneys appearing on behalf of Creditors and others in the above entitled cause.

Please take NOTICE that the Boise Title & Trust Company will on April 6th, 1916, at the hour of two o'clock P. M., at the court room of the above entitled Court move said Court to authorize the filing of the petition and fix time for hearing for the allowance of the claim of the Boise Title & Trust Company arising out of the giving of an appeal bond and a bond for a stay of execution in the case of J. W. Newman vs. the Great Shoshone and Twin Falls Water Power Company; the judgment in which case was affirmed by the Supreme Court on or about the 24th day of March, 1916.

This application is made at this time for the reason that, at the suggestion of the Court, the claim of the Boise Title & Trust Company was not heretofore presented because it had not yet accrued and the decision of the Supreme Court in the above cause had not been rendered and for that reason it was not known whether or not any liability would ensue.

(Signed) S. H. HAYS,

Attorney for Boise Title & Trust Company.

That at the time set for the hearing of the said petition the American Water Works and Electric Company, whose claim had theretofore been duly filed herein and allowed by the Court as a general creditor, and William T. Wallace as Receiver of

Great Shoshone and Twin Falls Water Power Company appeared by their solicitors and resisted the said petition.

Whereupon the matter was continued for further hearing. Thereafter, on the 10th day of April, 1916, a stipulation of facts in the matter of the said petition of Boise Title and Trust Company was duly entered into by and between the Solicitors for the petitioner and the Solicitors for American Water Works and Electric Company and other creditors, and for William T. Wallace as Receiver of Great Shoshone and Twin Falls Water Power Company, which stipulation is in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Idaho, Southern Division.*

GUY I. TOWLE, Complainant,

vs.

GREAT SHOSHONE & TWIN FALLS WATER
POWER COMPANY, a corporation, Defendant.

STIPULATION OF FACTS IN THE MATTER OF
THE PETITION OF THE BOISE TITLE
AND TRUST COMPANY FOR LIQUIDA-
TION OF BOND.

It is hereby STIPULATED AND AGREED that the following are facts to be considered in determining the said petition of the Boise Title and Trust Company.

1. That the Boise Title and Trust Company is a corporation as stated in the petition.

2. That the Great Shoshone and Twin Falls Water Power Company was a corporation duly organized and existing under the laws of the State of Delaware, and duly empowered to do business in the State of Idaho; that it commenced doing business in the State of Idaho about the year 1907 and continued down to the appointment of the Receiver herein.

3. That said Power Company owned an electric power plant in Gooding County, State of Idaho, at Lower Salmon Falls; also a power plant at Shoshone Falls in Lincoln County, State of Idaho, and upwards of two hundred miles of transmission lines in the vicinity of said plants, a large portion of which were in Lincoln County, State of Idaho.

4. That the Shoshone Light and Water Company was a corporation organized under the laws of the State of Idaho, doing business at the town of Shoshone in Lincoln County, State of Idaho; that it owned and operated a power plant and transmission lines in said town, and also a waterworks plant; that the said Shoshone Light and Water Company was in possession and control of said electric power plant and waterworks plant in the year 1912; that during said year a contract was made with the Great Shoshone and Twin Falls Water Power Company whereby a deed was placed in escrow by the Shoshone Light and Power Company with the agreement that said deed should be delivered to the Great Shoshone and Twin Falls Water Power Company when a certain amount, to-wit, the sum of \$55,000.00, with interest, was paid; that in said contract it was provided that

the Great Shoshone & Twin Falls Water Power Company should take possession of said property and receive the income thereof, and that it should apply sixty per cent of the income to the Shoshone Light and Water Company upon the purchase price of said property. A copy of the agreement is hereto annexed. That the Great Shoshone & Twin Falls Water Power Company went into possession of said property thereafter in the year 1912, and was in possession thereof at the time of the appointment of the Receiver herein; that the Receiver has remained in possession and has carried out the terms of said contract, and that there has been paid out of said income on account of the purchase price of said property by the Receiver under said contract in excess of the sum of \$7,000.00 and prior to the time of the appointment of the Receiver there was paid upon said contract between the Great Shoshone and Twin Falls Water Power Company out of said income more than \$1,500.00.

That on the 11th day of April, 1913, an accident occurred whereby a certain barn belonging to J. W. Newman was destroyed by fire; that said Newman claimed that the fire was caused by a current of electricity passing through electric wires and coming in contact with said barn, or its contents, said barn being situated in the town of Shoshone, in said Lincoln County. It was claimed that the wires causing the accident were in the possession of and operated by the Great Shoshone and Twin Falls Water Power Company, but that they had been constructed by the Shoshone Light and Water Company.

The said Newman filed a complaint on account of said accident on the 10th day of September, 1913, a copy of which is attached to the petition herein and made a part thereof; that in said suit brought by said Newman against said Power Company, a judgment was rendered on the 24th day of April, 1914, in favor of said Newman and against Power Company for the sum of \$1,079.80, and costs of suit; that said Newman threatened to have an execution issued and to levy upon the property of the defendant Power Company; that said Power Company thereupon requested the Boise Title and Trust Company to give a bond upon appeal from said judgment and for the stay of execution; that said bond was executed on the 8th day of June, 1914, and was duly filed in said cause on the 12th day of June, 1914, and thereafter execution was duly stayed; that a copy of said bond is attached to the petition herein; that the appeal in said cause was pending at the time of the appointment of the Receiver herein; that the appeal was further prosecuted by the Receiver after his appointment and briefs prepared and arguments made in the Supreme Court of the State of Idaho, upon said appeal, the hearing thereof having been had in the month of January, 1916.

That on the 24th day of March, 1916, the Supreme Court of the State rendered a judgment affirming the judgment of the lower Court in said cause, and that the Boise Title and Trust Company will be required to pay said bond unless the same is ordered paid by the Receiver herein.

That at the time of the execution of said bond, to-wit, on the 8th day of June, 1914, and also at the time of the filing of said bond, and at the time the request therefor was made by the Great Shoshone and Twin Falls Water Power Company, said company had a large amount of real property situate in Lincoln County, State of Idaho, upon which said judgment was a lien, subject, however, to any lien of the Equitable Trust Company, Trustee; that said Power Company was at the time acquiring the title to the property of the Shoshone Light and Power Company in the town of Shoshone where the accident hereinbefore mentioned occurred upon the power lines then owned by the Shoshone Light and Water Company but in the possession of and being operated by the Great Shoshone and Twin Falls Water Power Company; that the property of the said Shoshone Light and Water Company was acquired by the Great Shoshone and Twin Falls Water Power Company out of the income from said property, payments being made each month, an amount in excess of the claim of petitioner having been paid in this way prior to the execution of said bond and a large amount in excess of petitioners' claim having been paid subsequent to the execution of said bond and before the appointment of a Receiver herein, and that since the receivership herein, the Receiver has paid out of the income of said property on account of the purchase price therefor, a sum in excess of \$7,000.00. That the Great Shoshone and Twin Falls Water Power Company had on hand at the time of the giving and

filing of said bond, moneys in excess of the sum of \$1,500.00, which funds were held for use and were thereafter used for the payment of employees and the running expenses of the property, and that execution might have been levied upon said funds; that said company also had on hand at the time of the giving and filing of said bond supplies of various kinds exceeding in value the sum of \$1500.00, which supplies were purchased to be used and were actually used for repairs, upkeep and additions to the property in order to keep it a going concern; that said Power Company also had at said time equipment in excess of the value of \$1500.00, which equipment consisted of various electrical devices kept on hand for sale to customers, such as lamps, heaters, stoves, vacuum cleaners and other like appliances; that said company was also the owner of property which it claimed was included in a mortgage or trust deed given to secure the bonds of the company, but which ownership might have been contested and was contested in the foreclosure case herein referred to.

5. That on the 1st day of May, 1910, a mortgage was given by the Great Shoshone and Twin Falls Water Company to secure an issue of bonds; that on the 21st day of June, 1911, a supplementary mortgage was given; that on the 7th day of April, 1913, a second mortgage was given upon the property of the company; that the bonds of the company, instead of being sold to purchasers, were pledged as collateral to secure an issue of notes, the title to said bonds being retained by the Great Shoshone and Twin Falls

Water Power Company; that said company remained the owner of said bonds until about the month of April, 1915, when said bonds were sold under the terms of the pledge, at Pittsburg, Pennsylvania, such sale being without notice to the Receiver, this Court or to the petitioner; that, after said sale, a foreclosure suit was commenced in this Court for the purpose of recovering upon said bonds and foreclosing the mortgage or trust deed securing the same; that said suit was brought in this Court after the appointment of the Receiver herein and is entitled the Equitable Trust Company against the Great Shoshone & Twin Falls Water Power Company et al., and reference is hereby made to the records and files in said action, which are made a part of this stipulation, together with the records and files in this action;

That the Great Shoshone and Twin Falls Water Power Company was organized for the purpose of building electric power plants and transmission lines in a district then largely undeveloped; that it was a subsidiary corporation to the American Water Works and Guarantee Company; that said last named company was in the hands of a Receiver in the year 1913, and that its assets were taken over by the American Water Works and Electric Company, and that the Great Shoshone and Twin Falls Water Power Company then became a subsidiary corporation to the said last named company, and that it placed William T. Wallace in charge of the Great Shoshone & Twin Falls Water Power Company as general manager thereof; that the income of the Great Shoshone and Twin Falls Water Power Company was insufficient

to pay its operating and other expenses and interest upon its outstanding obligations.

The above are all the facts which the counsel for the respective parties now consider to be material, but if it should be found by the Court that additional facts may be necessary for the purpose of the determination of this case, then the right is reserved on the part of both parties to present any additional facts that may exist either by way of stipulation or by way of evidence before the Court.

S. H. HAYS,

April 8, 1916.

Attorney for Petitioner.

WYMAN & WYMAN,

Solicitors for Equitable Trust
Co., Guaranty Trust Com-
pany, American Water
Works and Electric Co., and
for the Receiver, herein.

AGREEMENT.

THIS MEMORANDUM OF AGREEMENT, made by and between Shoshone Light & Water Company, a corporation, of Shoshone, Idaho, party of the first part, and the Great Shoshone & Twin Falls Water Power Company, a corporation of Delaware, the party of the second part:

WITNESSETH, Party of the first part has this day transferred and turned over to the party of the second part all power plant transmission lines, fixtures, pumping plant, water mains, real estate and all other property owned by said party of the first part which is shown by the inventory of June 1, 1912,

and by the abstract of title furnished by first party to second party, in consideration of the sum of FIFTY-FIVE THOUSAND DOLLARS (\$55,000) paid and to be paid as follows, to-wit: FIFTEEN THOUSAND (\$15,000) DOLLARS cash, the receipt whereof is hereby acknowledged, and Forty Thousand (\$40,000) Dollars with interest thereon at the rate of six per cent (6%) per annum, to be paid out of the gross earnings of said plants, as follows:

Sixty per cent (60%) of the gross earnings of said plants to be paid by party of the second part to party of the first part each and every month until the full amount of Forty Thousand Dollars, together with interest thereon from this date at the rate of six per cent. per annum is fully paid.

Executed in duplicate this 1st day of July, 1912.

SHOSHONE LIGHT AND WATER COMPANY, LIMITED,

By FRED W. GOODING, President.

GREAT SHOSHONE & TWIN FALLS
WATER POWER COMPANY, LTD.,

By D. C. MacWATTERS, Vice-President.

THE FIRST NATIONAL BANK OF SHOSHONE.

Shoshone, Idaho, Feb'y 12th, 1913.

Received of F. C. Pierce, this 12th day of February, 1913, one certain deed executed by the Shoshone Light & Water Company, Limited, in favor of the Great Shoshone and Twin Falls Water Power Company, executed as of this date, and conveying certain properties as evidenced by Parcel First to Parcel Ninth, both inclusive, thereof.

The said deed to be held by this bank as per the terms and conditions of one certain Escrow Agreement made and entered into on February 6th, 1913, by and between the Shoshone Light & Water Company, Limited, party of the first part, and the Great Shoshone and Twin Falls Water Power Company, party of the second part, and which agreement has this day been received by this bank with the said deed first above mentioned.

THE FIRST NATIONAL BANK OF
SHOSHONE,

By W. HAIL HORNE, Cashier.

Thereafter the said petition came regularly on for hearing upon the said stipulation and such of the records and files in said cause as were pertinent, to-wit, the complaint herein, the order appointing Receiver herein, the claim and allowance of American Water Works and Electric Company, and the said stipulation of counsel hereinbefore contained.

Thereafter, on May 1st, 1916, the said matter having been argued by counsel and submitted, the Court rendered its decision as follows:

(Title of Court and Cause.)

DECISION ON APPLICATION OF BOISE TITLE
& TRUST COMPANY FOR ALLOWANCE
OF PREFERRED CLAIM.

May 1, 1916.

S. H. Hays, Attorney for Petitioner.

Wyman & Wyman, Attorneys for certain creditors.

DIETRICH, DISTRICT JUDGE:

A petition is presented by the Boise Title & Trust

Company in a creditors' suit brought against the judgment debtor for the purpose of administering its insolvent estate and applying the proceeds thereof to the payment of its debts. Concurrently with the creditors' suit a foreclosure suit has been prosecuted by the trustee for the bondholders, and under the decree therein all of the property of the judgment debtor has been foreclosed upon and sold, but final distribution of the proceeds of the sale has not yet been made. The petitioner is an Idaho corporation, having among other powers, that of becoming surety for litigants upon appeal and supersedeas bonds. Upon April 24, 1914, in one of the State Courts, a judgment was entered against the defendant company in favor of one Newman for \$1,079.80 as damages for the destruction of certain property as the result of faulty construction of an electric transmission line. The line had been installed by a company known as the Shoshone Light & Water Company, but at the time of the fire it was being operated by the defendant under a contract by which it was given possession of, and was to purchase, the system, of which the line was a part. Newman having threatened to issue execution, the defendant sued out an appeal to the Supreme Court of the State, and in that connection the applicant, upon the request of the defendant, and presumably for a valuable consideration, executed an appeal and supersedeas bond. The judgment has been affirmed, and the applicant now prays that the Receiver be required to satisfy it. The prayer is opposed by the Receiver and certain creditors of the estate, secured and unsecured.

The disposition of the petition involves two questions: (1) Is there a rule or principle by which a surety for a public service corporation is generally to be deemed to be a preferred creditor in case of its insolvency? And (2), if there is no such general rule, are the circumstances here exceptional and of such character as to warrant the relief prayed for?

The first question, it is thought, must be answered in the negative. While in the few and conflicting cases upon the subject some support may be found for the affirmative, the weight of both authority and reason is in my judgment against such a rule. In what the petitioner puts forth as the leading case upon the subject, (*Union Trust Co. v. Morrison*, 125 U. S. 591), the conclusion reached was the result of what were deemed to be exceptional circumstances widely differing from those here involved. In *Jones v. Central Trust Co.*, 73 Fed. 568 (6th C. C. A.), the syllabus fairly states the facts: "Certain property of the railroad company which was covered by mortgages was attached by a creditor who had secured a judgment against the company. Thereupon, in order to preserve the unity of the property and keep the railroad a going concern, the trustees in the mortgages caused such property to be replevined and bonds to be given with sureties for the return of the property or for the payment of its value, if adjudged to be subject to the attachment. The property was ultimately adjudged to be so subject, but in consequence of its having been taken into possession by a Receiver appointed in a foreclosure suit instituted by

the trustee it was impossible for the sureties on the replevin bonds to return the property, and executions were directed to issue against them for its value." Under these circumstances it was held that it was proper to direct the Receiver to pay the claim in preference to the mortgage lien. The facts were not closely analagous to those in the instant case, and in the light of the later decision of the same Court in *Whiteley vs. Central Trust Company of New York*, 76 Fed. 74, manifestly the inference cannot properly be drawn that the Court intended to establish or recognize the general rule under consideration. In the *Whiteley* case Judge Lurton analyses the *Morrison* case, and after considering the question at length, reaches the conclusion that surety upon a supersedeas bond given by a railroad company while apparently solvent and not in default, if compelled, after the insolvency of the company, to pay the judgment appealed from, is not entitled to be repaid from the proceeds of the property of the company in preference to the mortgagee thereof. This conclusion is clearly supported by the decision of Justice Brewer while sitting as a circuit judge in the case of *Blair v. Railroad Co.*, 23 Fed. 532, and by the more elaborate opinion of Judge Jenkins in *Farmers Loan & Trust Co. v. N. P. R. Co.*, 68 Fed. 36. The decision rendered by Judge Hanford of the Washington district in the *Farmers Loan & Trust Company* case (71 Fed. 245), strongly tends to support the petitioner's contention, but the ultimate conclusion there largely, if not entirely, rests upon the assumption that the pri-

mary obligation the enforcement of which was stayed by the bond under consideration was of a preferential character, and I entertain no doubt that if the primary obligation is of such character a surety who pays the same may claim preference under the principle of subrogation. Judge Hanfords' view was that a claim for personal injury arising out of the operation of a railroad was of a preferential character, and while I have very strong sympathy with that view, the established rule in this jurisdiction is to the contrary. In *Farmers Loan & Trust Co. v. Watts*, intervenor, 74 Fed. 431, there is an expression of dissent by Judge Gilbert, from Judge Hanford's reasoning, followed with the suggestion that his conclusion could be sustained upon other grounds. The question here under consideration was not before Judge Gilbert, and the remark referred to was made merely for the purpose of distinguishing Judge Hanford's decision. While an extract quoted in petitioner's brief from *Gay v. Hudson River Co.*, 182 Fed. 904, tends in a general way to support its view, the preference sought in that case was denied and the substantial reasoning of the opinion militates strongly against the petitioner. The reasoning is so pertinent to the facts here that I quote somewhat at length. "When the bond was executed and delivered, the Hudson River Electric Power Company, so far as appears, was doing business in the usual way and was apparently solvent. No execution had been issued, and no property had been levied upon, and the corporation was not in default in the payment of its

interest or current expenses so far as appears. The mortgage bondholders had no right to possess themselves of the mortgaged property or to interfere with the operations of the corporation at that time. It is probably true that an execution would have been issued and a levy made if the judgment had not been paid or the bond given, but, as already stated, it is not charged that the corporation did not at the time have money properly applicable thereto with which to pay the judgment, which was for damages for negligence, and not an ordinary operating expense. Of course, the negligence was in operating the business and gave rise to the cause of action, and in such sense was an operating liability. But still there is no allegation that current earnings which should or which might have been used to pay this liability were diverted to the purchase of property which has gone under the lien of the mortgage, or to the permanent improvement of such property, or in reduction of the bonded debt. Suppose the claim sued upon had been for property purchased and used in the business of the corporation generally, for repairs, changes, and operation, and defense had been made, judgment rendered against the corporation, and a bond given to stay execution on appeal, and the judgment affirmed and payment made by the sureties. Would the sureties be entitled to a preference over the mortgage bondholders? I think not. There would be no more equity in such case than in most cases where litigation is had, judgment obtained, and bonds given to stay execution, which judgments the sureties are

compelled to pay if the principal does not." Of like import is the case of *Pennsylvania Steel Co. vs. New York City R. R. Co., etc.*, 165 Fed. 485. I quote from the syllabus: "The surety on a supersedeas bond given by a street railroad company on appeals from judgments against it which has been compelled to pay such judgments, on their affirmance, after the insolvency of the Company, is not entitled to rank as a preferred creditor in the insolvency proceedings against the company with creditors having claims for supplies furnished to keep the road in operation." No other cases have been called to my attention. It would be an extremely dangerous doctrine and would render the securities of public service corporations most precarious if the mortgagor could, by permitting suit to be brought and judgment obtained against it, and then taking an appeal and furnishing a supersedeas bond, give priority over the bonds to an indebtedness which otherwise has no substantial features of a preferential claim.

Are the circumstances such as to make the claim exceptional and to warrant its payment in preference to other claims? The petitioner lays great stress upon the contention that the bond was given to protect and preserve the property of the company and to enable it to continue as a going concern. But, as pointed out by Judge Ray in the Gay case, the company here was apparently solvent at the time the judgment was entered, and could, if it saw fit so to do, have paid the claim. The assistance of the petitioner was therefore not necessary to enable it to pre-

serve the unity of its property or to continue as a going concern or to perform its obligations to the public. Apparently it was doing business in the usual way and was solvent. No execution had been issued, and no property had been levied on, and it was not in default in the payment of its interest or current expenses. It is altogether probable that an execution would have been issued and a levy made had the company failed to pay the judgment or give a supersedeas bond, but that fact establishes no strong equities in favor of the petitioner. In the agreement it was stated, and not denied, that the petitioner was in the business of furnishing bonds for a consideration, and therefore it is to be assumed that it was paid the ordinary charge for such a bond. Suppose that instead of taking an appeal and furnishing a supersedeas bond the judgment debtor had applied to a bank for a loan, and with the money thus secured had satisfied the judgment, the substantial equities in favor of the bank would, to say the least, be quite as strong as those in favor of the petitioner here, but in no view of the law could it for such reason alone be recognized as a preferred creditor.

In another aspect of the case, however, the petitioner's claim is quite distinctive. As already suggested, the electric line by which the fire was caused was constructed by the Shoshone Light & Water Company. It appears that the line passed diagonally across block 40 in the village of Shoshone, and across Newman's property, and that instead of erecting suitable poles, the company, in violation of Newman's

rights and without his knowledge or permission, attached the wires to his corrugated iron barn, and in such a manner that as they swayed back and forth they came into contact with the iron, and as a result combustible material in the barn was ignited. As further suggested, at the time of the fire the judgment debtor had possession of the system by permission of the Shoshone Light & Water Company under a contract to purchase. By the terms of that contract it paid a certain amount in cash and the balance was to be paid from month to month out of the income arising from the operation of the system. Among other things it is stipulated "that the property of said Shoshone Light & Water Company was acquired by the Great Shoshone & Twin Falls Water Power Company out of the income from said property, payments being made each month, an amount in excess of the claim of the petitioner having been paid in this way prior to the execution of said bond, and a large amount in excess of petitioner's claim having been paid subsequent to the execution of said bond and before the appointment of a Receiver herein, and that since the receivership herein the Receiver has paid out of the income of said property on account of the purchase price therefor a sum in excess of \$7,000.00." Now it is clear, I think, that under the averments of Newman's complaint he had a right of action against the Shoshone Light & Water Company as well as against the Great Shoshone & Twin Falls Water Power Company. He charged both the negligent construction and the negligent operation of

the system, and for the negligent construction the Shoshone Light & Water Company alone was responsible. Whether under a more or less generally recognized principle whereby the lessor of a public utility is held responsible to the public for the negligent operation thereof by its lessee, the Shoshone Light & Water Company is legally chargeable with the negligence of the Great Shoshone Company in operating the system, it is unnecessary to inquire. Certain it is that there is a very close connection between the two companies in their relation to the accident, for substantially the only negligence charged against the Great Shoshone Company is the continued maintenance and operation of the line in the improper condition in which it was constructed. Section 2796 of the Revised Codes of Idaho, as amended in 1909 (Session Laws 1909, p. 163), purports to confer upon corporations the power "to purchase and hold such real and personal estate as the purpose of the corporation may require, not exceeding the amount limited by this title; and to sell, lease, assign, transfer, mortgage, or convey any rights, privileges, franchises, real or personal property of the corporation, other than its franchises of being a corporation; and to purchase, own, vote, sell or hypothecate the stock and bonds of other corporations." But this provision must be read in the light of the limitations contained in Section 15 of Article XI of the Constitution of the State, which declares that "the legislature shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property

held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation or use or enjoyment of the franchise or any of its privileges." Now it is by virtue only of the "after-acquired property" clause of the trust deed which has been foreclosed that the trustee and the bondholders acquired any lien upon the system thus purchased from the Shoshone Light & Water Company, and it is elementary that under such a mortgage provision the lien of the mortgage attaches subject to all valid claims against the property at the time the title thereto passes to the mortgagor. If, as he had a right to do, Newman had sued the Shoshone Light & Water Company alone, or had joined it with the Great Shoshone Company as co-defendant, and had secured judgment against it, manifestly it could not, by transferring its property, have put it beyond his reach; he could have pursued it and insisted upon its application to the payment of his judgment. Insofar as the Great Shoshone Company is concerned doubtless the claim must be regarded as in every real sense an expense incident to the operation of the system. Certainly in determining the net result of operation and in computing the net income, expense of this character must be deducted from the gross income. But here we find that instead of applying the income to the payment of this claim a large part thereof has been devoted to the purchase price of the property, and now the property thus acquired and paid for has been sold for the purpose of discharging the bonds. As against New-

man, and, for that reason alone, as against the petitioner here also, it would seem to be highly inequitable that the bondholders should thus receive the proceeds of the property without first paying an obligation incurred by the mortgagor in operating it for the purpose of procuring the very funds by which it was to be acquired and made available to the bondholders. In view of these considerations, I think that even if the Court were not legally bound, it would be strongly constrained by the equities, to recognize this claim as being superior to that of the bondholders, insofar as the proceeds of the sale of this property is concerned. But, however that may be, the execution and the placing in escrow of the deed by the Light & Water Company after it had negligently constructed the lien, and the delivery of such deed to the Great Shoshone Company after the accident, could not, in the face of the constitutional provision above quoted, operate to defeat Newman's right to pursue the property conveyed and require that it first be devoted to the satisfaction of his claim. *Seymour v. Boise R. Co.*, 24 Idaho, 7; 132 Pac. 427.

In giving the concrete relief warranted by this view some difficulty is encountered by reason of the fact that the property thus acquired was sold, together with all other properties belonging to the judgment debtor, as a unit, and hence there is no way of ascertaining the amount which it brought. However, a part of the property purchased from the Shoshone Light & Water Company was the village water system, and this was later resold to the village by the Great Shoshone Company, the sale having been fully

consummated since the appointment of the Receiver. The Receiver has now been paid in full by the village on account of the purchase price, and he now holds an amount greatly in excess of the claim. I see no reason why it should not be paid out of this fund.

Counsel for the petitioner may prepare an order directing the Receiver to pay the full amount of the Newman judgment out of the funds in his hands received from the village of Shoshone.

And thereafter, on May 3rd, 1916, the said Court made and entered herein its order granting said petition of said Boise Title and Trust Company.

ORDER SETTLING STATEMENT.

The within and foregoing is settled and allowed this 18th day of November, 1916, as the statement on the appeal of American Water Works and Electric Company and William T. Wallace as Receiver of Great Shoshone and Twin Falls Company taken from that certain order made and entered herein on the 3rd day of May, 1916, and the same contains all of the papers and records considered by the Court in granting the petition of the said Boise Title and Trust Company for preference and indemnity, except the complaint, order appointing the Receiver, the claim of American Water Works and Electric Company and the order allowing the same.

FRANK S. DIETRICH,

District Judge.

Dated November 18, 1916.

Endorsed: Filed November 20, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Equity No. 509.

ORDER FOR PAYMENT OF PREFERRED
CLAIM TO THE BOISE TITLE & TRUST
CO. In Re. NEWMAN CASE.

The petition of the Boise Title & Trust Company for an allowance of a preferred claim for and on account of the said Trust Company having given an appeal bond and a bond for stay of execution in the case of J. W. Newman v. The Great Shoshone & Twin Falls Water Power Company, having come on for hearing;

And it appearing to the Court that said petition should be allowed, therefore, in accordance with the decision rendered herein;

It Is Hereby Ordered, that the Receiver of the Great Shoshone & Twin Falls Water Power Company pay to said J. W. Newman or his attorney of record from the funds now in his hands received from the sale of the Village Water System in the town of Shoshone, such sum as may be required to fully indemnify the said Boise Title & Trust Company on account of its liability on said bond in the above entitled case, the amount being \$1,228.55, together with interest at rate of seven per cent from the 24th day of April, 1914, and the sum of \$30.25 costs as directed by the Supreme Court of the State of Idaho in its remittitur in said cause.

FRANK S. DIETRICH, Judge.

Dated May 3rd, 1916.

Filed May 3rd, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

GUY I. TOWLE,

Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WA-
TER POWER COMPANY, a corporation,

Defendant.

In Equity No. 509.

PETITION OF AMERICAN WATER WORKS
AND ELECTRIC COMPANY, A CORPORA-
TION, AND WILLIAM T. WALLACE, RE-
CEIVER OF GREAT SHOSHONE AND
TWIN FALLS WATER POWER COMPANY,
FOR APPEAL AND ORDER ALLOWING
APPEAL.

Come now American Water Works and Electric Company, a corporation, and William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company, and, considering themselves aggrieved by the order made and entered herein on the 3rd day of May, 1916, granting the application and petition of Boise Title and Trust Company for the allowance of its claim as a preferred claim and for indemnity and directing said Receiver of the Great Shoshone and Twin Falls Water Power Company to pay to J. W. Newman or his attorneys of record from the funds in the hands of the said Receiver received from the sale of the village water system in the town of Shoshone such sum as might be required fully to indemnify the said Boise Title and Trust Company on account of its liability upon the appeal bond re-

ferred to in said order, hereby appeal from the said order so made and entered as aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith; and your petitioners pray that this appeal may be allowed, and that citation issue as provided by law and that a copy of the record proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WYMAN & WYMAN,

Solicitors for American Water
Works and Electric Company
and William T. Wallace, Re-
ceiver of Great Shoshone and
Twin Falls Water Power Com-
pany.

October 25, 1916.

FRANK T. WYMAN, of Counsel.

ORDER ALLOWING APPEAL.

AND NOW, to-wit, on the 30th day of October, 1916, it is Ordered that the above and foregoing petition be granted and the appeal be allowed as prayed for. The appeal bond shall be in the sum of \$500.00.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed Oct. 30, 1916.

W. D. McReynolds, Clerk.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

GUY I. TOWLE, Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WA-
TER POWER COMPANY, a corporation,

Defendant.

In Equity No. 509.

ASSIGNMENT OF ERRORS.

And now come American Water Works and Electric Company, a corporation, and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order made and entered in the above entitled cause on the 3rd day of May, 1916, granting the petition of Boise Title and Trust Company for indemnity and directing the said William T. Wallace as Receiver of said Great Shoshone and Twin Falls Water Power Company to pay to J. W. Newman, or his attorneys of record, a sum specified in said order, and say that the said order and decision made and entered as aforesaid, are erroneous and unjust to these appellants and particularly in this:

1st. Because the Court erred in holding, ordering, adjudging and decreeing in its said order that the said claim of the Boise Title and Trust Company is a preferred claim or is entitled to preference over the claims of other general creditors and particularly over the claim of the appellant American Water Works and Electric Company.

2nd. Because the Court erred in holding, ordering, adjudging or decreeing in its said order that the Receiver of said Great Shoshone and Twin Falls Water Power Company pay to said Newman or to his attorneys out of funds in his hands received from the sale of the Village Water System in the Town of Shoshone such sum as should be required to indemnify the said Boise Title and Trust Company on account of the said liability referred to in said order, or to pay any sum whatsoever out of said or any fund or at all.

3rd. Because the Court erred in holding, ordering, adjudging and decreeing on said order that the said Boise Title and Trust Company is entitled to any relief upon its said petition or at all.

Wherefore, the said American Water Works and Electric Company and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Company, pray that the order so made and entered as aforesaid on the 3rd day of May, 1916, be annulled and set aside and the petition of the said Boise Title and Trust Company be denied and that it be refused all relief herein.

WYMAN & WYMAN,

Solicitors for American Water Works and Electric Company, and for William T. Wallace, as Receiver Great Shoshone and Twin Falls Water Power Company.

October 25th, 1916.

FRANK T. WYMAN, of Counsel.

Endorsed: Filed Oct. 30, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity No. 509.

KNOW ALL MEN BY THESE PRESENTS, That we, American Water Works and Electric Company, a corporation organized under the laws of the State of Virginia, and W. T. Wallace as Receiver of the Great Shoshone and Twin Falls Water Power Company, as principals, and National Surety Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto Boise Title and Trust Company, petitioner and claimant herein, and to Guy I. Towle, plaintiff herein, Great Shoshone and Twin Falls Water Power Company, a corporation, defendants, Lynch-Cannon Engineering Company, a corporation, Equitable Trust Company of New York, a corporation, Inter-Mountain Electric Company, a corporation, The Thousand Springs Power Company, a corporation, Electric Investment Company, a corporation, L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, Intervenor and petitioners; as their respective interests may appear herein in the penal sum of Five Hundred Dollars, to be paid to plaintiff, defendant, intervenors and petitioners as their respective interests may appear, as aforesaid, their and each of their executors, administrators, successors, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day

of October, A. D. one thousand nine hundred and sixteen.

The conditions of this obligation are such that:

Whereas, the above-named American Water Works and Electric Company and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order made and entered in said cause on the 3rd day of May, 1916, by the United States District Court for the District of Idaho, Southern Division, granting the petition of the said Boise Title and Trust Company for preference and indemnity,

Now, Therefore, if the above-named principals, American Water Works and Electric Company, and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, shall prosecute their said appeal to effect and, if they shall fail to make their said appeal good, shall answer all costs, then the above obligation to be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principals have caused their respective names to be hereunto subscribed by their duly authorized solicitors and said surety has caused its name to be hereunto subscribed by its duly authorized officers and its corporate seal affixed the day and year first above written.

AMERICAN WATER WORKS AND
ELECTRIC COMPANY,

By WYMAN & WYMAN,
Its Solicitors.

WILLIAM T. WALLACE,

Receiver Great Shoshone and Twin

Falls Water Power Company,

By WYMAN & WYMAN.

NATIONAL SURETY COMPANY,

By L. W. ENSIGN,

(Corporate Seal)

Its Attorney in Fact.

The above and foregoing bond is hereby approved.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed Oct. 30, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity No. 509.

PRAECIPE ON APPEAL OF AMERICAN WATER WORKS AND ELECTRIC COMPANY AND WILLIAM T. WALLACE, RECEIVER OF GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY.

To the Clerk of the Above Entitled Court:

You will please prepare the record on the appeal of the American Water Works and Electric Company and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, taken in the above entitled cause from the order made and entered herein on May 3, 1916, granting the petition of the Boise Title and Trust Company for preference and indemnity.

Said record is to consist of the following:

1. Complaint of Guy I. Towle.
2. Order appointing Receiver.

3. Claim of American Water Works and Electric Company.
4. Order allowing claim of American Water Works and Electric Company.
5. Statement of Appellants herein.
6. Order of May 3, 1916.
7. All papers in connection with the appeal:
 - Petition of American Water Works and Electric Company, and William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company, on appeal;
 - Order allowing appeal of these appellants;
 - Assignment of Errors of these appellants;
 - Citation of these appellants on the appeal;
 - Bond of these appellants on this appeal.
8. In the event any of the papers included in appellant's proposed statement as filed herein be excluded upon the settlement thereof, then such excluded papers shall be printed as part of record.

In preparing the above record you will please omit the title to all pleadings, except the first, but in lieu thereof insert the words "Title of Court and Cause," to be followed by the name of the pleading or instrument. You will also please omit the verification to all pleadings, but in lieu thereof, whenever the pleading is verified, use the words "duly verified."

WYMAN & WYMAN,
Solicitors for American Water
Works and Electric Company and
William T. Wallace as Receiver
of Great Shoshone & Twin Falls
Water Power Company.

We waive our right to file praecipes and join in the above praecipes.

S. H. HAYS,

Solicitor for Boise Title and Trust
Company.

KARL PAINE,

Solicitors for Guy I. Towle, Com-
plainant.

S. H. HAYS, and

P. B. CARTER,

Solicitors for Great Shoshone and
Twin Falls Water Power Com-
pany, Defendant.

MARTIN & CAMERON,

Solicitors for L. M. Plumer and
E. B. Scull, Executors of the es-
tate of L. L. McClelland, deceased,
Intervenors.

EDWIN SNOW,

Solicitor for Lynch-Cannon Engi-
neering Company, Intervenors.

SULLIVAN & SULLIVAN,

Solicitors for Equitable Trust
Company of New York.

PARSONS & PARSONS,

Solicitors for Inter-mountain
Electric Company and The
Thousand Springs Power Com-
pany, Intervenors.

RICHARDS & HAGA,

Solicitors for Electric Investment
Company, Intervenor.

Endorsed: Filed Dec. 16th, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity No. 509.

CITATION.

United States of America,—ss.

To the President of the United States of America:

To Guy I. Towle, plaintiff, Great Shoshone and Twin Falls Water Power Company, a corporation, defendant, and Boise Title and Trust Company, Lynch-Cannon Engineering Company, a corporation, Equitable Trust Company of New York, a corporation, Inter-Mountain Electric Company, a corporation, The Thousand Springs Power Company, a corporation, Electric Investment Company, a corporation, L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, Intervenor and Petitioners:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, by American Water Works and Electric Company and William T. Wallace, Receiver of the Great Shoshone and Twin Falls Water Power Company, in a suit wherein the Guy I. Towle is complainant, and Great Shoshone and Twin Falls Water Power Company, a corporation, is defendant, and Boise Title and Trust Company, Lynch-Cannon Engineering Company, a corporation, Equitable Trust Company

of New York, a corporation, Inter-Mountain Electric Company, a corporation, The Thousand Springs Power Company, a corporation, Electric Investment Company, a corporation, L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, interveners and petitioners, to show cause, if any there be, why the order in said appeal mentioned should not be corrected and speedy justice should not be done for the parties in that behalf.

WITNESSETH, the Hon. Frank S. Dietrich, United States District Judge for the District of Idaho, this 30th day of October, 1916, and the independence of the United States the one hundredth and forty-first year.

FRANK S. DIETRICH,

Attest:

District Judge.

W. D. McREYNOLDS, Clerk.

Service of the above and foregoing citation and receipt of copy thereof admitted this 31st day of October, 1916.

S. H. HAYS,

Solicitor for Boise Title and Trust Company.

KARL PAINE,

Solicitor for Guy I. Towle, Complainant.

P. B. CARTER,

Solicitor for Great Shoshone and Twin Falls Water Power Company, defendant.

MARTIN & CAMERON,

Solicitors for L. M. Plumer and E. B. Scull, Executors of the estate of L. L. McClelland, deceased, Interveners.

THURMAN, WEDGWOOD & IRVIN,
Solicitors for Lynch-Cannon Engineer-
ing Company, Interveners.

SULLIVAN & SULLIVAN,
Solicitors for Equitable Trust Company
of New York.

PARSONS & PARSONS,
Solicitors for Inter-Mountain Electric
Company and The Thousand Springs
Power Company, Interveners.

RICHARDS & HAGA,
Solicitors for Electric Investment Com-
pany, Intervener.

Endorsed: Filed Nov. 14, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

W. D. McREYNOLDS,

(Seal)

Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing transcript of pages numbered from 1 to 87, inclusive, contain true and correct copies of Complaint of Guy I. Towle, Order Appointing Receiver, Claim of American Water Works and Electric Company, Order allowing claim of American Water Works and Electric Company, Statement of Appellants herein, Order of May 3, 1916, Petition of American Water Works and Electric Company and William T. Wallace, Receiver of Great Shoshone and Twin Falls Water Power Company for Appeal, Order allowing appeal of these Appellants, Assignment of Errors of these Appellants, Bond of these Appellants on appeal, Praecipe, Citation, Return to Record and Clerk's Certificate, in the cause aforesaid, which together constitute the transcript of record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit. I further certify that the costs of the record herein amounts to the sum of \$103.55, and that the same has been paid by appellants.

Witness my hand and the seal of said Court this 21st day of December, 1916.

W. D. McREYNOLDS,

(Seal)

Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, and WILLIAM T. WALLACE, Receiver of Great Shoshone & Twin Falls Water Power Company, a corporation,

Appellants,

vs.

GUY I. TOWLE, plaintiff, GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a corporation, defendant, and BOISE TITLE AND TRUST COMPANY, a corporation, LYNCH-CANNON ENGINEERING COMPANY, a corporation, EQUITABLE TRUST COMPANY OF NEW YORK, a corporation, INTER-MOUNTAIN ELECTRIC COMPANY, a corporation, THE THOUSAND SPRINGS POWER COMPANY, a corporation, ELECTRIC INVESTMENT COMPANY, a corporation, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, deceased, intervenors and petitioners,

Appellees.

Filed

FEB 13 1917

F. D. Monckton,
 Clerk.

BRIEF FOR APPELLANTS.

This is an appeal by the American Water Works and Electric Company as a creditor, and William T.

Wallace as Receiver of the Great Shoshone & Twin Falls Water Power Company, hereinafter called the Great Shoshone Power Company, from an order of the District Court filed May 3, 1916, directing the Receiver to pay a judgment for \$1,228.55, recovered by J. W. Newman against the Great Shoshone Power Company, out of the proceeds of the sale of the village water system in the town of Shoshone (pp. 74-6). This order was made in pursuance of a petition presented by the Boise Title and Trust Company, which had given a bond to secure the judgment pending an appeal, and prayed that the Receiver be required to pay the judgment in order to relieve it from its obligation on the bond (pp. 35-42).

The substantial question presented is whether the judgment recovered by Newman was entitled to a preference in the distribution of the proceeds of the sale of the Shoshone water system, over and above the mortgage bondholders and other creditors of the Great Shoshone Power Company. The decision of the District Court to the effect that the judgment was entitled to such preference is based upon Section 15 of Article XI of the Constitution of the State of Idaho which provides:

“The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held hereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation or use or enjoyment of the franchise or any of its privileges.”

The principal contentions of the appellants relate to the meaning and effect of this section of the Constitution and its applicability to the present controversy. The main facts appear from a stipulation made for the purpose of this petition of the Boise Title and Trust Company (pp. 52-61).

Prior to July 1, 1912, the great Shoshone Power Company, a corporation of the State of Delaware, owned and was operating two electric power plants, together with upwards of two hundred miles of transmission lines in the State of Idaho. The Shoshone Light and Water Company, a corporation of the State of Idaho, owned and was operating a power plant and transmission lines and also a water works plant in the town of Shoshone, in the State of Idaho (p. 53). On July 1, 1912, it entered into a contract with the Great Shoshone Power Company, by which it transferred and turned over to the Great Shoshone Power Company all power plants, transmission lines, fixtures, pumping plant, water mains, real estate and other property, shown by a certain inventory and abstract of title, in consideration of the sum of \$55,000, of which \$15,000 was paid in cash and the balance was to be paid out of the gross earnings of the plants, the contract providing that the Great Shoshone Power Company should pay to the Shoshone Light and Water Company in each month sixty per cent. of the gross earnings of the said plants until the balance of \$40,000, with interest, was fully paid (pp. 59-60). On February 12, 1913, the Shoshone Light and Water Company delivered to the First National Bank of Shoshone a deed in favor of the Great Shoshone Power Company, to be held under

an escrow agreement dated February 6, 1913 (pp. 60-61). The Great Shoshone Power Company went into possession of the property of the Shoshone Light and Power Company and continued to operate it until November 2, 1914, when, upon the application of a creditor, the District Court appointed a Receiver of all the property of the Great Shoshone Power Company, upon the ground that it was insolvent and unable to meet its obligations as they matured and became payable (pp. 7-20).

The claim of the American Water Works and Electric Company, as a general creditor of the Great Shoshone Power Company, was duly filed and allowed by the District Court (pp. 20-34).

On the 11th day of April, 1913, a certain barn belonging to J. W. Newman and situated in the town of Shoshone, was destroyed by fire. Newman claimed that the fire was caused by a current of electricity passing through electric wires and coming into contact with his barn or its contents; that the wires had been constructed by the Shoshone Light and Water Company, but were at the time of the fire in possession of and operated by the Great Shoshone Power Company. He brought an action in the State court against the Great Shoshone Power Company alleging negligent construction and negligent maintenance and operation of the wires, recovered a judgment on the 24th day of April, 1914, for \$1,079.80 and threatened to issue execution against the property of the Great Shoshone Power Company. The Boise Title & Trust Company thereupon gave a bond to secure the judgment and stay execution pending an

appeal to the Supreme Court of Idaho. This appeal was pending at the time of the appointment of the Receiver. The Supreme Court of Idaho affirmed the judgment in favor of Newman on the 24th day of March, 1916 (pp. 46-7; 54-5).

At the time of the execution of the bond by the Boise Title and Trust Company the Great Shoshone Power Company was acquiring the property covered by the contract of July 1, 1912, and had paid on account of the purchase price and out of the income from said property, an amount in excess of Newman's judgment. After the execution of the bond and before the appointment of the Receiver the Great Shoshone Power Company paid on account of the purchase price and out of the income from the property an amount in excess of Newman's judgment. The Receiver completed the purchase, paying on account of the purchase price and out of the income from said property an amount in excess of \$7,000 (p. 56).

On May 1, 1910, the Great Shoshone Power Company made a mortgage to secure an issue of bonds, on June 21, 1911, it made a supplemental mortgage and on April 7, 1913, it made a second mortgage upon its property. At some time after April, 1915, an action to foreclose the first mortgage was brought by the Equitable Trust Company as Trustee (pp. 57-58).

It thus appears that, at the time of the fire and also at the time of the entry of Newman's judgment, the property covered by the contract of July 1, 1912, comprising a lighting system and water system in the town of Shoshone, was in the possession of and being operated by the Great Shoshone Power Company, and a

deed for the conveyance thereof was in escrow, the Great Shoshone Power Company having the right, upon payment of the balance of the purchase price, to acquire the legal title which was still vested in the Shoshone Light and Water Company, that the contract of July 1, 1912, together with the rights of the Great Shoshone Power Company thereunder, was subject to the lien of its mortgages, and that the Receiver, presumably with the authority of the District Court, adopted and carried out the contract of July 1, 1912, acting no doubt for the best interests of the estate.

The order appealed from, directing the Receiver to pay Newman's judgment out of the proceeds of the water system, has the effect of displacing the lien of the mortgages of the Great Shoshone Power Company and giving to Newman a preference over the mortgage bondholders and all other creditors of that Company.

It is apparent from the allegations of the petition that the Boise Title & Trust Company based its claim to a preference, chiefly upon the contention that it had, by giving the bond, protected the property of the Great Shoshone Power Company from levy and sale under execution and had permitted the Company to use for the maintenance and operation of its systems, funds and supplies which would otherwise have been required for the payment of the judgment, and had thus benefited the interests of the mortgage bondholders and the general creditors of the Company and was equitably entitled to have the Receiver pay the judgment and thus relieve it from liability (pp. 41-2).

The District Court rejected the claim in so far as it was based upon mere considerations of equity or benefit

to the estate, and held that, independently of Section 15 of Article XI of the Constitution of Idaho, the Boise Title & Trust Company was not entitled to any preference, citing authorities which seem to be conclusive on this point (pp. 60-68). The court then proceeded to consider Section 15 of Article XI of the Constitution and held that the Shoshone Light and Water Company was liable to Newman for negligence in the construction of the wires which caused the fire, that such liability existed before the contract of July 1, 1912, and that the Shoshone Light and Water Company could not by transferring or agreeing to transfer its property to the Great Shoshone Power Company, defeat Newman's right to pursue the property and require that it be devoted to the satisfaction of his claim. The court further held that, as the property acquired from the Shoshone Light and Water Company became subject to the mortgages of the Great Shoshone Power Company by virtue of after-acquired property clauses, and necessarily in the condition respecting liens and claims which existed at the time of its acquisition by the Great Shoshone Power Company, the claim of Newman was superior to that of the mortgage bondholders (pp. 69-72).

The District Court recognized one serious practical difficulty arising from the fact that all the property of the Great Shoshone Power Company was sold as a unit under a foreclosure decree and that there was no way of ascertaining separately the amount realized for the property acquired from the Shoshone Light and Water Company. He met this difficulty by saying that a part of the property in question, to wit: the water system, was later sold separately to the

Town of Shoshone at a price which was greater than the amount of Newman's judgment, and directing that the judgment be paid out of the proceeds of this sale, which had come into the hands of the Receiver (pp. 72-3). The record does not furnish any evidence or explanation of this transaction, but it is possible that the purchaser at the foreclosure sale consented, in consideration of some reduction in price, that the Receiver might sell the water system to the Town of Shoshone and retain the proceeds. It was fully recognized that the lighting system and the water system, acquired from the Shoshone Light and Water Company, and necessarily the proceeds thereof, were subject to the lien of the mortgages of the Great Shoshone Power Company.

The appellants submit that the District Court has made certain assumptions of fact which are not justified by the record and that he has misinterpreted and misapplied Section 15 of Article XI of the Constitution of Idaho. They contend that there is no basis for the conclusion that the Shoshone Light & Water Company was liable to Newman for the damage caused by the fire. The question of its liability to Newman was not involved or decided in the action brought by Newman against the Great Shoshone Power Company, and was not raised by the petition of the Boise Title & Trust Company. Nor is there any basis for the inference that any franchise was leased or transferred by the Shoshone Light & Water Company to the Great Shoshone Power Company. The contract, petition and other papers refer only to the sale of physical properties comprising the lighting system

and water system. Even if the Shoshone Light & Water Company were liable to Newman, such liability could not exist until the fire had occurred, and could not have been incurred by that Company in the operation, use or enjoyment of any franchise.

The appellants assign that it was error for the District Court to hold that the claim of the Boise Title and Trust Company was entitled to any preference or priority over other creditors, and error to direct that Newman's judgment be paid out of the proceeds of the water system, and error to grant to the Boise Title and Trust Company any relief whatever (pp. 77-8).

POINT I.

Section 15 of Article XI of the Constitution does not create any lien or any new liability and does not apply unless there is a lease or alienation of a franchise which purports to release or relieve the franchise or property held thereunder from some liability previously contracted or incurred in the operation, use or enjoyment of such franchise.

This section of the Constitution is in form merely a limitation upon the power of the Legislature. It probably has the effect of limiting the authority *to lease or transfer franchises*, conferred upon corporations by Section 2796 of the Revised Code of Idaho, to the extent of requiring that the *leasing or alienation* of a franchise should not *release or relieve* the franchise or

property held thereunder from liabilities, which had already been contracted or incurred in the operation, use or enjoyment of the franchise. It does not, however, say anything about liens or preferences, and does not purport to give to the liabilities mentioned any lien upon the franchise or property held thereunder or any preference or priority over other claims enforceable against the franchise or property. Much less does it purport to create any new kind of liability.

The section has no effect unless there is a lease or alienation of a franchise which purports to *release* or *relieve* the franchise or property held thereunder from some liability which would otherwise be enforceable against such franchise and property. It does not give to the holder of any liability any form of security or any preference or priority over other creditors which he would not have if the lease or alienation were not made. The section does not say that his position is to be improved or strengthened by the lease or alienation, but merely that it shall not be prejudiced or weakened thereby. The question whether the liability exists and against what property it is enforceable must depend upon the situation existing before the lease or alienation of the franchise and upon the law independently of Section 15.

Seymour v. Boise Railroad Co., 24 Idaho, 7.

Lee v. Southern Pacific R. R. Co., 116 Cal., 97.

Murray v. Chesapeake & Ohio Ry. Co., 115 S. W. 82.

Russell's Administrators v. Frankfort Ry. Co., 116 S. W. 289.

Wyeth Hardware Co. v. Jas. Spencer Bateman Co., 47 Pac. 604.

Cooper v. Utah Light & Ry. Co., 102 Pac. 202.

Central Trust Co. v. Warren, 121 Fed. Repr. 323 (C. C. A., 9th Circuit).

Sundles v. Idaho-Oregon Light & Power Co., 218 Fed. Rep. 698 (D. C. Idaho).

In *Seymour v. Boise R. R. Co.*, *supra*, the Supreme Court of Idaho said:

“ It will be noticed that the Constitution does not forbid a transfer of the franchise and property of a corporation, but simply declares that no sale or transfer shall release the franchise and property held thereunder from any liability incurred by the grantor or lessor or grantee or lessee in the operation, use, or enjoyment of such franchise. Section 15, art. 11, Const.; *City of South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 579, 93 Pac. 490. It was the intention of the framers of the Constitution to make these *pre-existing* ‘liabilities’ preferred claims against the franchise and property transferred, and to declare them prior and superior to any *subsequent* bonds, mortgages, or incumbrances placed thereon by the purchaser or transferee of such franchise and property ”.

Although the liabilities in question are referred to as preferred claims, it is evident that the Court did not intend to hold that these liabilities had any preference or priority over other unsecured claims. No question of preference or priority was presented, the only point

in controversy being whether the liabilities of a grantor could be enforced against the franchise and the property held thereunder in the hands of the grantee.

In *Central Trust Company v. Warren, supra*, the Circuit Court of Appeals of the Ninth Circuit held, that a section of the Constitution of Montana, similar to Section 15, Article XI, of the Constitution of Idaho, did not give to a claim for personal injuries priority over a mortgage previously made. The Court said:

"It is further contended by the appellee that the priority of his judgment is secured to him under section 17 of article 15 of the Constitution of Montana. That section provides as follows;

'Sec. 17. The legislative assembly shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor or lessee or grantee contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges.' "

In what respect this prohibition upon the power of the legislative assembly has been violated by legislative act is not pointed out, and our attention has not been called to any statute enacted by the legislative assembly which this provision of the Constitution forbids. But, assuming that the prohibition applies directly, without legislation, to the leasing or alienation of a franchise contrary to the terms of the prohibition, the question arises, what act in this case is claimed to be prohibited by the Constitution? It must be, if anything, the act of releas-

ing or relieving the franchise and the property held thereunder from a liability of the grantor incurred in the operation, use, and enjoyment of the franchise. But in what respect did the execution of the mortgage or trust deed in this case release or relieve the grantor from such liability? The giving of a mortgage does not relieve or release the grantor or the property held thereunder from any liability; it merely provides a security for the debt for which the mortgage is given, and whatever other liability there may be remains as before. If the value of the franchise or property held thereunder is sufficient, all liabilities, including the mortgage debt, will be paid in their order, and paid in full. Whether any debt or liability will be paid depends upon the solvency of the corporation and the value of its property, and not upon the terms of the conveyance to the mortgagee. There is no relieving or releasing the franchises or the property held thereunder from any liability unless the mortgagor is insolvent, or unless the mortgage is given in anticipation of insolvency. But no such condition of the mortgagor at the time the mortgage was executed is alleged or claimed in this case. The mortgage was given for a valuable consideration and in due course of business, and it is not alleged that it was given for the purpose of hindering or delaying other creditors. It is true it is alleged in the bill of complaint that the mortgagor is insolvent, but this allegation has reference to the date when the bill was filed, on October 15, 1901, and not to the date when the mortgage was given, on January 1, 1895. For all that appears in this record, the mortgagor was solvent when

the mortgage was given, and was also solvent when the appellee recovered his judgment, on June 4, 1901. There is, therefore, no act alleged tending to show that the mortgage was intended to release or relieve the franchise or the property held thereunder from the liability of the judgment obtained by the appellee, or that the enforcement of the mortgage lien was intended to have that effect. Indeed, it is clear that the right claimed by the appellee to have his judgment declared a prior lien to that of the mortgage is not provided for in the section of the Constitution under consideration. The section does not deal with the priority of liens, but has a different purpose, as has been determined by the Supreme Court of California in *Lee v. Southern Pacific R. R. Co.*, 116 Cal. 97, 100, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140, where a similar provision of the Constitution of the State of California was under consideration."

In *Russell's Administrators v. Frankfort Ry. Co.* (*supra*), the Kentucky Supreme Court, in construing a similar provision of the Constitution of Kentucky, said:

"It was not the purpose of Sec. 203 of the Constitution to make the debts of a corporation a lien upon its assets * * *. It was not the purpose of the Constitutional provision to put the creditor in a better position after the alienation than he was in before the sale was made. It was designed only to prevent the sale from prejudicing him."

In so far as Section 15 applies to liabilities of a lessor or grantor, it is clear that it can apply only to

liabilities contracted or incurred *before* the lease or alienation. A liability incurred by a lessor or grantor *after* the lease or alienation of the franchise could not be incurred or contracted in the operation, use or enjoyment thereof. After the lease or alienation of a franchise it is only the lessee or grantee who can operate, use or enjoy the franchise.

It cannot, of course, be claimed that Section 15 was intended to make a lessor or grantor responsible for any liabilities incurred by the lessee or grantee after the lease or alienation. There is nothing in the section to indicate an intention to make a liability enforceable against property or assets of any party other than the one which contracts or incurs the liability. The section does not purport to subject the franchise or property held thereunder to any liabilities which would not otherwise be enforceable against them. It was designed merely to prevent the franchise and property held thereunder from being *released* or *relieved* from liabilities of a certain kind, to which the franchise and property were already subject. It is accordingly clear that the section does not give to the holder of a claim contracted or incurred by a lessee in the operation, use or enjoyment of a franchise any right against the lessor or the interest of the lessor in the franchise and property held thereunder.

The District Court did not hold that the Shoshone Light and Water Company was responsible for the liability incurred to Newman by the Great Shoshone Power Company, and it is clear that it was not responsible for any negligence of the Great Shoshone Power Company in the maintenance or operation of the prop-

erty covered by the contract of July 1, 1912. He referred to "a more or less generally recognized principle whereby the lessor of a public utility is held responsible to the public for the negligent operation thereof by its lessee", but said that it was unnecessary to inquire whether such a principle applied to the present controversy (p. 70). We submit that it is settled by the great weight of authority that the lessor of a public utility or other property is not responsible for personal injury or damage claims based upon the negligence of the lessee in the maintenance or operation of the property.

Hayes v. Northern Pac. R. Co., 74 Fed. Rep. 279 (C. C. A. 7th Cir. 1896);

Arrowsmith v. Nashville R. Co., 57 Fed. Rep. 165 (C. C. Tenn.);

Yeates v. Ill. Cent. R. Co., 137 Fed. Rep. 943 (C. C. Ill. 1905);

Curtis v. Cleveland, etc., R. Co., 140 Fed. Rep. 777 (C. C. Ill. 1905);

Noyes, Intercorporate Relations, 2nd Ed., §§ 218-220.

We further submit that the relation between the Shoshone Light & Water Company and the Great Shoshone Power Company was not that of lessor and lessee. The contract of July 1, 1912, was a contract of sale and not a lease. When a Vendee enters into possession and undertakes the management and operation of property under a contract of sale, pending the full payment of the purchase price and delivery of the deed, the payment of installments of the purchase price is not treated as the payment of rental for the use of

the property and the relation is not that of Lessor and Lessee, unless there is some express agreement to that effect.

Carpenter v. United States, 17 Wallace, 489;
Moulten v. Norton, 5 Barb. (N. Y.) 286;
Sylvester v. Ralston, 31 Barb. (N. Y.) 286;
Moen v. Lillestal, 5 North Dakota, 327;
Underhill on Landlord and Tenant, § 223.

In order to sustain the order appealed from it is necessary for the Boise Title and Trust Company to show:

1. That the Shoshone Light and Power Company leased or transferred a franchise to the Great Shoshone Power Company.

2. That the Shoshone Light and Water Company incurred a liability to Newman in the operation, use or enjoyment of such franchise.

3. That such liability was enforceable against such franchise and the "property held thereunder", and that such lease or transfer purported to "release" or "relieve" such franchise from such liability, and

4. That the water system was "held under" such franchise.

POINT II.

There is no evidence of the lease or alienation of any franchise by the Shoshone Light & Water Company.

The District Court does not, in the opinion, consider the question whether the transaction between the Shoshone Light & Power Company and the Great Shoshone Power Company involved the lease or alienation of any franchise. It was apparently assumed that the Shoshone Light & Water Company had municipal franchises from the town of Shoshone to cover the lighting business and water business, and that these franchises were transferred to the Great Shoshone Power Company, together with the physical properties. There is, however, no evidence in the record to substantiate this assumption. The petition of the Boise Title & Trust Company alleges that the property of the Shoshone Light & Water Company consisted of "an electric light plant and a waterworks plant", and makes no mention of any franchise (p. 36). The contract of July 1, 1912, referred only to plants, transmission lines, water mains, fixtures and real estate, and all other property of the Shoshone Light & Water Company which was shown by a certain inventory and a certain abstract of title (pp. 59, 60). Neither the inventory nor the abstract of title are contained in the record, and it is not permissible to infer that any franchise was mentioned on either of them. It is quite reasonable to infer that the Great Shoshone Power Company, which was itself engaged in a public utility business, had all franchises and legal authority necessary for the operation of the lighting system and water system in the town of Shoshone.

POINT III.

There is no evidence that the Shoshone Light & Water Company incurred any liability to Newman in the operation, use or enjoyment of any franchise.

There is no evidence in the record that the wires which caused the fire were constructed by the Shoshone Light & Water Company or that negligence in the construction thereof was the cause of the fire.

The judgment recovered by Newman against the Great Shoshone Power Company established, as against the receiver and all parties to this proceeding, that the fire was caused by the negligence of the Great Shoshone Power Company in the maintenance and operation of the wires, that is, in permitting the wires to remain loose and to sway and strike against the side of the barn and in failing to have them properly insulated, attached and fastened. The complaint filed by Newman contains allegations of negligence in this respect on the part of the Great Shoshone Power Company (p. 46), and it is clear that the liability of that Company could have been adjudicated only on the theory that it had been negligent and that its negligence had caused the damage. There is no theory on which the Great Shoshone Power Company could have been held liable for any negligence in the construction of the wires by the Shoshone Light & Water Company.

The stipulation of facts contains merely the statement that Newman *claimed* that the wires which caused

the accident had been constructed by the Shoshone Light & Water Company. It does not contain any statement to the effect that they were in fact constructed by that Company, much less that there was any negligence in the construction thereof.

The District Court does not refer, in the opinion, to any evidence tending to show that the Shoshone Light and Water Company was liable to Newman for the damage caused by the fire. He refers merely to the "averments of Newman's complaint" and the fact that he "charged both the negligent construction and the negligent operation of the system" (pp. 69-70). It would be extraordinary if in a proceeding of this kind the allegations contained in a complaint filed in another and independent action could be accepted as evidence. A copy of this complaint was attached to the petition of the Boise Title & Trust Company, but there is nothing in the record to show that the parties admitted the allegations of the complaint or even the allegations of the petition. The petition was resisted by the American Water Works and Electric Company and the Receiver, and thereupon the parties entered into a stipulation of facts for the purpose of the hearing on the petition and incorporated in that some but not all of the allegations of the petition (pp. 51-2). It stands to reason that the court is not justified in relying on such allegations as evidence and that the stipulation of facts contains the only evidence in the record with reference to the damage and liability therefor.

From the fact that the damage was caused by negligence in the maintenance or operation of the wires attached to Newman's barn, it cannot reasonably be

inferred that there was negligence in the construction of the wires. It may well be that they were properly attached and insulated when they were first put up and that they did not become loose or sway or strike against the side of the barn until some time thereafter. The probability is that the insulation gradually wore off after the wires became loose and began to sway and strike against the barn, which was made of corrugated iron, and that the fire was due solely to the negligence of the Great Shoshone Power Company in failing to properly inspect the wires and keep them in good and safe condition. The intervening negligence of the Great Shoshone Power Company precludes any causal connection between negligence (if any) in construction and the damage. As a matter of fact, if the wires were not properly constructed and were in a dangerous condition before July 1, 1912, it is hard to understand why the fire did not occur until more than eight months after that date.

Even if it were assumed that the Shoshone Light & Water Company was liable to Newman, it is clear that such liability was not incurred by that Company in the use, operation or enjoyment of any franchise. The liability, if any existed, was not incurred until the date of the damage. Negligent construction of wires does not in and of itself create any liability. It is only when such negligence is followed by damage caused thereby that any right of action can accrue.

2 Cooley on Torts, 3rd Ed., p. 1410.

Murray v. Chesapeake & Ohio Ry. Co., 115

S. W. Repr. 821.

Denver & Rio Grande R. R. Co. v. Dunn,
46 Colo. 150.
29 Cyc. 563, and cases cited.

In *Murray v. Chesapeake & Ohio Ry. Co.*, *supra*, the Supreme Court of Kentucky held that the date of the damage was the date when the liability was incurred within the meaning of the provision of the Kentucky Constitution similar to Section 15 of Article XI of the Idaho Constitution.

In *Denver & Rio Grande R. R. Co. v. Dunn*, *supra*, the Supreme Court of Colorado said:

“No liability attaches on account of negligence unless damage results from it.”

The result is that if Newman had at any time any cause of action against the Shoshone Light & Water Company, it did not accrue until April 13, 1913, more than eight months after the possession of the property was transferred to the Great Shoshone Power Company and the Shoshone Light & Water Company had ceased to use or operate it. If any franchise was covered by the contract of July 1, 1912, it is clear that the Shoshone Light & Water Company was not using, operating or enjoying it at the time of the damage. At all times after July 1, 1912, the Great Shoshone Power Company was using, operating and enjoying all the property covered by that contract. The word “enjoyment” is equivalent to “operation” or “use”.

Ward v. Crane, 118 Cal. 676;

Baker v. State, 17 Fla. 408.

POINT IV.

There is no evidence that any franchise or property has by any lease or alienation been "released" or "relieved" from any liability to Newman.

In so far as Newman acquired any right of action against the Great Shoshone Power Company, it accrued on the 11th day of April, 1913, and was enforceable only against the property and assets of that Company. All the property of that Company was covered by mortgages, including its rights under the contract of July 1, 1912, which had already become subject to the first mortgage of the Great Shoshone Power Company by virtue of the after-acquired property clause, and to its second mortgage, which had been made on the 7th day of April, 1913 (p. 57).

Newman had no lien upon any property and no preference or priority over any of the creditors of the Great Shoshone Power Company until he recovered his judgment. He then acquired a lien, which, however, was subject to all pre-existing liens upon the property of the Great Shoshone Power Company, and of course did not attach to any property of the Shoshone Light and Water Company. The lien of his judgment was suspended when the bond of the Boise Title & Trust Company was given to stay execution pending the appeal (Sec. 4457 of Idaho Revised Codes of 1908). Before the judgment was affirmed all the property of the Great Shoshone Power Company passed into the possession of the Receiver, so that at

the time of the appointment of the Receiver Newman had no lien or security and no preference or priority over other creditors.

It is well settled that in case of the insolvency of a public utility personal injury and damage claims based upon negligence in maintenance or operation are not entitled to a preference over the claims of mortgage bondholders or unsecured creditors.

St. Louis Trust Co. v. Riley, 70 Fed. 32 (C. C. A. 8th Cir.).

Penn. Steel Co. v. N. Y. City Ry. Co., 165 Fed. 457 (C. C. A. 2nd Cir.).

Atcheson, etc., R. Co. v. Osborn, 148 Fed. 606 (C. C. A. 8th Cir.); aff. 207 U. S. 589.

In so far as Newman acquired any right of action against the Shoshone Light & Water Company, it accrued on the 11th day of April, 1913, and was enforceable only against the property and assets of that Company. The property of that Company affected by the order appealed from was covered by the contract of July 1, 1912, and the escrow agreement of February 6, 1913, and subject to the right of the Great Shoshone Power Company to receive an absolute deed upon payment of the balance of the purchase price. Newman's right was necessarily subordinate to this right of the Great Shoshone Power Company and the rights of its mortgagees.

The Receiver adopted the contract of July 1, 1912, paid the balance of the purchase price and acquired the title to the property of the Shoshone Light & Water Company, presumably under the direction of the Court,

and because it was believed that the contract was a valuable asset, and that completion thereof would enure to the benefit of the general creditors as well as the mortgage bondholders. This acquisition of property, however, was merely the result of the exercise of a right created by the contract of July 1, 1912, before any liability to Newman was incurred. Newman was one of the general creditors for whose benefit the Receiver was appointed, and is presumed to have been acting. If the Receiver had not used funds in his possession for the purpose of making payments under the contract of July 1, 1912, Newman would have had no right to claim that they should be applied to the payment of his judgment. He cannot now complain of the fact that the Receiver adopted and carried out the contract and acquired title to the property pursuant to its provisions.

The property in question has subsequently been sold under a decree foreclosing the mortgages of the Great Shoshone Power Company which existed before the liability to Newman was incurred. Of these sales of course Newman cannot complain. They were merely the result of the enforcement of the rights existing before his claim accrued. It thus appears that since the liability to Newman was incurred there has not been any lease or alienation of any franchise or other property which has prejudiced or in any way affected Newman's right. No franchise or other property, which was in any sense subject to any liability to him, has been released or relieved from any such liability.

It is well settled that involuntary transfers or sales

made pursuant to contracts or mortgages are not within the meaning of Section 15 of Article XI of the Constitution. That section does not affect or impair any right or lien created by contract or mortgage before the liability in question is contracted or incurred.

Russell's Admr. v. Frankfort Ry. Co., 116 S. W. 289;

Roush v. Vanceburg Turnpike Co., 120 Ky. 169;

Central Trust Co. v. Warren, 121 Fed. 328;

Sundles v. Idaho-Oregon Light & Power Co., 218 Fed. 698.

Before Newman's claim accrued, there had been, in substance and in equity, an alienation of the property of the Shoshone Light & Water Company. The contract of July 1, 1912, had the effect of transferring to the Great Shoshone Power Company the equitable ownership and also the possession and right to operate. As far as Newman and other creditors were concerned, the situation was the same as if the purchase price had been paid in full and an absolute deed for the property had been delivered. It is well settled that in situations like this, when the deed has been delivered from escrow to the grantee, the title of the grantee is deemed to relate back to the time when the contract of purchase was made and the deed was placed in escrow, except as against purchasers for value without notice. A tort creditor like Newman could not be a purchaser for value, and so it did not make any difference whether he had notice of the contract, but in any case the transfer of possession to the Great Shoshone Power Company was

constructive notice which would put all persons upon inquiry as to the terms of the contract of purchase and the rights of the Great Shoshone Power Company thereunder.

Whitmer v. Schenk, 11 Idaho, 702;

Lane v. Ludlow, 14 Fed. Cas. 1081; Case No. 8052;

Moyer v. Hinman, 13 N. Y. 180;

Fleming v. Wilson, 92 Minn. 303;

Carolina Portland Cement Co. v. Roper, 67 So. Repr. 115;

Whitfield v. Harris, 48 Miss. 710;

Filley v. Duncan, 1 Neb. 134;

Black on Judgments, Sec. 438; 23 Cyc. 1373, 1374, 1382.

If it were held that all franchises and property held thereunder were subject to claims accruing after a lease or alienation as the result of negligence of the lessor or grantor occurring before the lease or alienation, a condition of great confusion and hardship would result. Nobody who took a lease, mortgage or other transfer of a franchise and property held thereunder, could ascertain the amount or nature of the claims affecting the franchise and property. There is a sound and just reason for permitting the holder of a claim, which has already accrued, to follow the franchise and property into the hands of a lessee or grantee, and it is entirely possible for a lessee and grantee to ascertain in advance the nature and extent of such claims and make provision for their payment. The leasing and alienation of franchises would, however, be greatly

hampered and restricted if every lessee, purchaser and mortgagee were bound to act at his peril, and to take the franchise and property subject to unknown and unascertainable claims which might or might not come into existence at a later date.

There is no reason apparent in the present record why Newman should not enforce his claim against the Shoshone Light & Water Company if that Company is, upon any theory, liable for his damage. That Company has received payment of the purchase price of its property in full, and is, of course, bound to pay all its debts before making any distribution among the stockholders. There is no allegation or suggestion that the Shoshone Light & Water Company is now or was at any time insolvent, and nothing in the record to show whether Newman has or has not made any attempt to collect from that Company.

POINT V.

There is no evidence that the Water System was "held under" any franchise, which was leased or transferred by the Shoshone Light and Water Company or any franchise, in the operation, use, or enjoyment of which the liability to Newman was incurred.

The utter impossibility of applying section 15 of Article XI of the Constitution to the present controversy is demonstrated by an attempt to identify the franchise in the operation, use or enjoyment of which

the liability to Newman was incurred, and to ascertain whether that franchise was leased or transferred by the Shoshone Light and Water Company and whether the water system was "held under" that franchise. It has been held that the words "property held thereunder" do not include all property used for or in connection with the operation of the franchise, but only that property for the use of which the franchise is essential.

Cooper v. Utah Light & Ry. Co. 102 Pac. Repr. 202.

In this case the Company was engaged in the business of generating and distributing electricity and held a municipal franchise authorizing it to use the streets for its poles and wires. It was held that the power houses and other property belonging to the Company, which was not in the streets, was not "held under" the franchise, because the Company could have owned and operated such property without any franchise. The only property held under the franchise was that located in the streets for the construction and operation of which the franchise was essential. The Utah Supreme Court said at page 208:

"However were it not for the direct recitals contained in the agreed statement of facts and upon which the findings of the court were based, we would be much inclined to the opinion that neither the stations, power houses, engines, boilers, nor other machinery used in generating or manufacturing electricity nor the real estate upon which they were situated, nor any of the personal property described in the findings

would be properly held under the franchises granted by the municipality for the reason that it might well be said that all such property was held separate from and independent of the particular franchise referred to and had its existence wholly independent thereof. While it may be said that the stations and power houses and machinery were necessary to manufacture or generate the electricity which was conducted along the wires on the poles placed in the streets under the franchises, yet the granting of the franchises to use the streets for the purpose of erecting and maintaining poles and wires to conduct electricity was not necessary to the right or privilege to manufacture or generate electricity nor to produce or sell it as a commercial product. The corporation could have engaged in such business and could have acquired and held the plant, machinery and real estate and all the personal property mentioned in the findings and could even have conducted and delivered electricity to consumers wholly independent of the franchise granted it by Salt Lake City."

There is no evidence in the record to show what franchises were held by the Great Shoshone Power Company or the Shoshone Light and Water Company or whether any franchise was covered by the contract of July 1, 1912. Nor is there any allegation with respect to franchises in the petition of the Boise Title and Trust Company.

Even if it be inferred that the Great Shoshone Power Company had acquired a municipal franchise for the operation of the lighting system and water system in the town of Shoshone, there is no basis on

which anybody could determine whether it had one franchise to cover the two lines of business or a separate franchise for each. It is not impossible that the town should have granted one franchise broad enough to cover the use of the streets for the distribution of water as well as the distribution of electricity. It is much more likely, however, that separate franchises were granted at different times and to different grantees.

Even if there were only one franchise, nevertheless the liability to Newman was not incurred in the operation, use or enjoyment of that franchise, because the wires which caused the damage were on Newman's private property and not in the streets. The Company did not need any municipal franchise for the purpose of attaching those wires to his barn. In any event the "property held thereunder" would not include the entire water system. It would only include that part which was located in the streets.

If there were two separate franchises, it is clear that the water system could not, under any circumstances, be treated as "held under" the lighting franchise, and that the liability to Newman could not upon any theory be regarded as incurred in the operation, use or enjoyment of the water franchise. The result is that, upon this hypothesis, the water system could not have been "held under" any franchise in the operation, use or enjoyment of which the liability to Newman was incurred.

The record wholly fails to support the conclusion that the liability to Newman was incurred in the operation, use or enjoyment of any franchise leased or transferred by The Shoshone Light and Water Company,

or that the water system was "held under" any such franchise. The inevitable result is that Newman could not have any right under Section 15 to follow the water system for the satisfaction of his claim.

The District Court clearly recognized that it was impossible to ascertain what amount was realized from the sale of the lighting system. Much less could anybody determine what amount was realized from the sale of that part of the lighting system or water system which was located in the streets. The Court directed the payment of the claim out of the proceeds of the sale of the water system because that was the only part of the property acquired from the Shoshone Light & Water Company which was sold separately. It is clear, however, that such a result cannot possibly be justified even on the legal theory adopted by the Court.

POINT VI.

The order appealed from should be reversed and the petition of the Boise Title & Trust Company should be dismissed.

Respectfully submitted,

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